TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 618

UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 30, 1930

CERTIORARI GRANTED MARCH 2, 1931

(35,540)

(35,540)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 11, 1931

a. Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA, Ex Relatione Ethel M. McLennan, petitioner
vs.
RAY LYMAN WILBUR, SECRETARY of the Interior, Department, respondent
} At law No. 76795

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Mandamus*

Filed June 3, 1929

In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA Ex Relatione Ethel M. McLennan, petitioner
vs.
RAY LYMAN WILBUR, SECRETARY of the Interior Department, respondent
} At law No. 76795

The petition of the United States of America on the relation of Ethel M. McLennan, respectfully represents unto this honorable court:

1. That the said Ethel M. McLennan is a citizen of the United States, and a resident of the State of California.

2. That the said Ray Lyman Wilbur, respondent herein, is the Secretary of the Department of the Interior of the United States, and as such is sued in respect of his official duties as hereinafter more particularly set forth.

3. That Congress by an act approved February 25, 1920 (41 Stat. 437), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," provides, among other things, in section 1:

"That deposits of * * * oil, oil shale or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State, or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: * * * *Provided further*, That citizens of another country, the laws, customs,

or regulations of which deny similar or like privileges to
2 citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control own any interest in any lease acquired under the provisions of this act."

And in section 13:

"That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit. * * * To prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field," etc.

4. Regulations concerning the issuance of oil and gas permits and leases, under the act of February 25, 1920, and in pursuance thereof, were duly promulgated by the Secretary of the Interior March 11, 1920, and are designated as "General Land Office—Circular No. 672," in which said regulations the necessary qualifications of applicants are set forth as follows:

"1. QUALIFICATIONS OF APPLICANTS.—Pursuant to Section 1 of the act, permits may be issued to (a) a citizen of the United States; (b) an association of such citizens; (c) a corporation organized under the laws of the United States or of any State or Territory thereof; or (d) a municipality."

Section 4 of the aforesaid regulations, under the title "FORM AND CONTENTS OF APPLICATION" provided that no specific form of application is required, but that said application shall be under oath, contain applicant's name and address, "proof of citizenship of applicant, by affidavit or such fact, if native born," etc., a statement that the applicant comes within the requirements of the law in respect of any interest in other oil and gas permits and leases under the act; a description of the land upon which a permit is desired; that the land applied for is not within any known geological structure of a producing oil or gas field; requires of the applicant references as to reputation and business standing, and provides that a bond shall be furnished by applicant, which bond may be filed "within 10
3 days after receipt of notice by the applicant that the permit will be granted when bond is filed," etc.

5. The northwest quarter of section thirty-four, township twenty-six south, range twenty-one east, M. D. M., California containing 160 acres, being public domain of the United States, was, prior to September 24, 1928, covered by an oil and gas permit known as Sacramento 019789, and on September 24, 1928, this permit was ordered canceled by the then Secretary of the Interior. The cancellation was to become effective October 29, 1928, on which date, under instructions from the General Land Office, the register of the United States land office, directed to receive applications for permits under the act of February 25, 1920, between the hours of 9 and 10 a. m., and in the event of there being conflicting applications, to hold a public drawing at 2 p. m. on said day, the successful applicant under regulations then in force being the first qualified applicant whose name was drawn.

6. On October 29, 1928, the said Ethel M. McLennan submitted to the Register of the land office of the United States at Sacramento, California, her application duly executed, in due and proper form

and complying in all respect with the regulations of the Department of the Interior regarding such permit applications, for a permit to prospect for oil and gas upon the land referred to and described as above, a copy of which application is attached hereto and made a part hereof. This application was filed in the United States land office at Sacramento, California, on October 29, 1928, at 10 a. m., and there being another conflicting application, the application of the said Ethel M. McLennan was duly placed in the drawing provided for as hereinabove stated.

7. This applicant, Ethel M. McLennan, was the one whose name was first drawn in the United States land office at Sacramento, California, under the procedure directed by the Commissioner of the General Land Office and on November 7, 1928, the register of the United States land office at Sacramento, California, advised the Commissioner of the General Land Office at Washington, D. C., by letter of that date, as follows:

"Letter "'N" of Sept. 24, 1928, canceled oil and gas permit, serial 019789, formerly Visalia 010576, of George Hesse, cancellation effective Oct. 29, 1928.

"Description of land:

"NW¼ Sec. 34, T. 26 S., R. 21 e., M. D. M.

"Two applications were filed for the land between the hours of 9 and 10 a. m. on Oct. 29, 1928. Drawing held at 2 p. m. same day.

"Successful applicant:

"Ethel M. McLennan, Serial 023466 Drew No. 1.

"Unsuccessful applicant:

"Wilbur O. Retherford, Serial 023465 Drew No. 2.

"The applications are transmitted herewith.

"Very respectfully,

"JOHN C. ENY, *Register*."

8. On March 13, 1929, a telegram was forwarded to the various United States land offices including United States land office at Sacramento, California, which telegram was signed by the then Commissioner of the General Land Office and approved by the Secretary of the Interior, stating and directing that—

"No oil and gas prospecting permits will be issued on or after March twelfth, nineteen twenty nine. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked.

"SPRY, *Commissioner*.

"Approved:

"RAY LYMAN WILBUR, *Secretary*."

9. On March 13, 1929, the Department of the Interior released the following memorandum for the press:

"IMMEDIATE RELEASE

"MARCH 13, 1929.

"Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending.

"These instructions are in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration.'

"Permits to prospect for oil and leases of land for its development have in the past been issued under the act of February 25, 1920. That act states 'that the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe to grant to an applicant qualified under this act a prospecting permit.'

"The General Land Office in its Circular No. 672, says 'It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied either
6 in part or in its entirety, as the facts may be deemed to warrant.'

"(P. N. 30582.)"

10. On March 26, 1929, the following letter signed by the then Commissioner of the General Land Office and approved by the Secretary of the Interior was addressed to the register of the United States land office at Sacramento, California:

MARCH 26, 1929.

Sacramento (023466 "N" LL.). Ethel M. McLennan, claimant. Oil and gas application for prospecting permit Filed October 29, 1928. Rejected and case closed

REGISTER, *Sacramento, California.*

SIR: Pursuant to instructions issued to the registers of the district land offices approved by the Secretary of the Interior, March 13, 1929, that no oil and gas prospecting permits will be issued after March 12, 1929, and in accordance with the policy announced in departmental order No. 337 of March 16, 1929, the application for oil and gas prospecting permit, serial number and name of applicant appearing above, is hereby rejected and the case closed.

So note your records and advise the parties in interest by ordinary mail, returning and filing fees.

Very respectfully,

WILLIAM SPRY, *Commissioner.*

Approved: March 26, 1929.

RAY LYMAN WILBUR, *Secretary.*

7 11. Departmental order No. 337 of March 16, 1929 referred to in letter of March 26, 1929 quoted in Paragraph 10 hereof reads as follows:

DEPARTMENT OF THE INTERIOR.

Memorandum for the press

IMMEDIATE RELEASE.

March 16, 1929.

Secretary Ray Lyman Wilbur, of the Department of the Interior, to-day issued a departmental order appointing a committee of three to pass upon outstanding permits to prospect for oil and gas on Government lands and to make recommendations as to which of those

permits should be cancelled. The members of that committee are: The Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. The order also lays down the general policy with relation to these permits to be followed by the department. In detail it follows:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

"There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.

"Probably in none of the cases on hand has the applicant expended money for developmental purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.

"Where land covered by pending applications is likely to be drained by adjoining wells on privately owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.

"With regard to the 20,000 outstanding permits on public lands, the department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

"To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor for the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations.

"Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This in-
8 cludes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in joint drilling program, test wells being drilled by a responsible drilling company or some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

"No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually as directed by the act of Congress approved March 2, 1929.

"(P. N. 30656.)"

12. Section 32 of the act of February 25, 1920, reads as follows: "SEC. 32. That the Secretary of the Interior is authorized to prescribed necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act shall be construed or held to affect the rights of the States or other local authority to exercise any right which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property or assest of any lessee of the United States."

13. Your relator avers that under the provisions of the act of February 25, 1920 (41 Stats. 437), hereinabove referred to, the said Ethel M. McLennan was duly qualified under the law to receive the permit for which she applied; that she at all times has stood and now stands in constant readiness, and is in fact ready, able, and willing actually and in all respects of every kind and nature whatsoever fully and completely, to comply with all the regulations made pursuant to the law in respect of duties and obligations of a permittee under the act aforesaid, and petitioner avers that the Secretary of the Interior is without authority of law to reject her application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted and March
9 16, 1929, also identified as Order No. 337; that such notices, orders, and policies are contrary to the act of February 25, 1920, under which petitioner has filed her said application for prospecting permit; that the issuance of a prospecting permit to a qualified applicant is purely a ministerial duty imposed by law upon the Secretary of the Interior; that the only discretion which the law allows the said Secretary of the Interior is embodied in said section 32 of said act of February 25, 1920; that no press notice, policy, order, circular, or regulation of the Secretary of the Interior contrary to the expressed provisions of the act of February 25, 1920, is binding upon your petitioner; that the said Order No. 337 identified as Press Notice of March 16, 1929, upon which was based the rejection of petitioners' application for prospecting permit, is contrary to the said act of February 25, 1920, and particularly to section 1 thereof, which states that deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States ——— shall be subject to disposition in the form and manner provided by this act ——— that the word "authorized" as used in section 13 of said act of February 25, 1920, hereinabove quoted is mandatory and not permissive; that the action of the Secretary of the Interior in denying a permit to the petitioner is arbitrary, confiscatory, retroactive, and illegal.

14. The petitioner, in view of the refusal of the Secretary of the Interior to approve her application, duly and properly made, for an oil and gas permit in respect of the land referred to, is without remedy in the premises, unless a remedy is granted her by this honorable court commanding the Secretary of the Interior to reinstate her application, to approve the same, and issue the permit of which application was made.

Wherefore, the premises considered. Your petitioner prays:
10 1. That a writ of mandamus may be issued, directed to the respondent, Ray Lyman Wilbur, Secretary of the Interior, commanding him to reinstate the application of Ethel M. McLennan, known as oil and gas permit application Sacramento 023466, to approve the same and issue a prospecting permit thereon.

2. That a rule may be issued requiring the respondent, the Secretary of the Interior, to show cause, if any he has, why a writ of mandamus may not be issued as herein prayed.

3. For such other right or rights, relief or order as to the court may seem proper and the nature of the case may require.

ETHEL M. McLENNAN,
Petitioner.

LEWIS EDWIN HOFFMAN, Esq.,
Attorney for Petitioner.

STATE OF CALIFORNIA,
County of Fresno, ss:

Before me, Wm. Lambert, a notary public, within and for Fresno County, California, personally appeared Ethel M. McLennan, who being by me first duly sworn, on oath says that she is the petitioner named in the foregoing petition by her subscribed, and knows the contents thereof; that the statements of facts therein made as upon personal knowledge are true, and those made upon information and belief she believes to be true.

[SEAL.] WM. LAMBERT.

Subscribed and sworn to before me this 27th day of May, 1929. My commission expires October 25, 1932.

11 Sacramento 023466 & 023465. 1337830—1. Report on drawing. Trans. Apps. for O. & G. Pros. permits. CAM

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Sacramento, Calif., Nov. 7, 1928.

COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

Sir: Letter "N" of Sept. 24, 1928, canceled oil and gas permit, serial 019789, formerly Visalia 010576, of George Hess, cancellation effective Oct. 29, 1928.

Description of land:

NW. ¼ Sec. 34, T. 26 S., R. 21 E., M. D. M.

Two applications were filed for the land between the hours of 9 a. m. and 10 a. m. on Oct. 29, 1928. Drawing held at 2 p. m. same day.

Successful applicant:

Ethel M. McLennan. Serial 023466. Drew No. 1.

Unsuccessful applicant:

Wilbur O. Retherford. Serial 023465. Drew No. 2.

The applications are transmitted herewith.

Very respectfully,

JOHN C. ENY, *Register.*

12 20 00 1337830—2

Received U. S. land office, Sacramento, Calif. Date, Oct. 29, 1928. Hour, 10 a. m. Sacramento, 023466

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Sacramento, California.

Receipt No. 2939655

Application for prospecting permit (Act of February 25, 1920—Public 146)

To the honorable COMMISSIONER GENERAL LAND OFFICE,
Washington, D. C.

I, Ethel M. McLennan, whose post-office address is Box 157, McKittrick, California, a native-born citizen of the United States of America, and whose husband is a native-born citizen of the United States of America, hereby apply for a permit to prospect for oil and gas upon the NW. ¼ of Section 34, Township 26 South, Range 21 East, M. D. M., containing 160 acres, more or less, as shown by the plat of official survey of said township in the United States land office at Sacramento, California, in which land district said land is situated.

This application is made under the provisions of the act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain."

Said land is not in any known geological structure producing oil or gas, but is believed to offer a favorable field for prospecting for oil and gas because of the geological formation in that vicinity.

In conducting exploratory operations on said land arrangements will be made within the time allowed, after issuance of permit, to erect on said land a drilling outfit of approved type and the work of drilling thereon will be commenced at the earliest date practicable and continued with diligence.

I am filing this application in my own behalf and not in the interest of any other person or persons, association, or corporation.

13 I am not interested directly or indirectly in any permit or lease or in any application for permit or lease under said act except application Sacramento Serial 023224 for the S. ½ SW. ¼, NE. ¼ SW. ¼ Section 1; W. ½ Lot 2 of NE. ¼ and SW. ¼ NE. ¼ of Section 3; NE. ¼ Section 15, Township 25 South, Range 19 East, M. D. M., and also application Sacramento Serial 023386 for the NW. ¼ of Section 22; SW. ¼ Section 26; SE. ¼ Section 28 Township 26 South, Range 21 East, M. D. M., containing 480 acres, more or less, which land is in the same geological structure as the land this date applied for. It is desired that should this application receive No. 1 at the drawing to be held in the United States land office in Sacramento, California, at 2 o'clock p. m. October 29, 1928, the date on which the land applied for will be subject to application, under said act of February 25, 1920, Public 146, amendments thereto

and circulars issued thereunder, that it be considered as an amendment to said application 023386.

As to my reputation and business standing I refer to Arthur Crites, banker, Bakersfield, California; James Ogden, city manager, Bakersfield, California; B. C. Janes, merchant, Bakersfield, California.

A surety bond will be filed herewith when necessary.

ETHEL M. MCLENNAN,
Applicant for Permit.

Subscribed and sworn to before me this 23d day of October, 1928.

H. C. BARTON,
Notary Public in and for the County of Fresno, State of California.

My commission expires September 21, 1930.
Festes 107/108 Nov. 20, 1928. G. H. G.

14 In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA EX RELATIONE Ethel M. McLennan, petitioner *v.* RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR Department, respondent	At law No. 76795

Answer and response to the rule

Filed June 28, 1929

* * * * * * *

Comes now Ray Lyman Wilbur, designated herein as the respondent, and by way of return to the rule to show cause issued herein and for answer to the petitioner says:

1. He admits the allegations of paragraph 1.
2. He admits the allegations of paragraph 2.
3. He admits the allegations of paragraph 3.
4. He admits the allegations of paragraph 4.
5. He admits the allegations of paragraph 5.
6. He admits the allegations of paragraph 6.
7. He admits the allegations of paragraph 7.
8. He admits the allegations of paragraph 8.
9. He admits the allegations of paragraph 9.
10. He admits the allegations of paragraph 10.
11. He admits the release of the press notice contained in paragraph 11, and that same substantially sets forth departmental order 337 of March 26, 1929.
12. He admits the provisions of section 32 of the act of February 25, 1920.

15 13. He denies all of the allegations of section 13 of the petition except such as are contained in the first seven lines thereof to and including the words "obligations of a permittee under the act aforesaid" in the eighth line, which he admits.

14. He denies the allegations of paragraph 14.

15. Further answering, respondent alleges that the administration of the act of February 25, 1920 (41 Stat. 437, sec. 32), is reposed in

the Secretary of the Interior with whose authority, reasonably exercised, the courts may not interfere unless the Secretary fails, refuses, or neglects to perform a mandatory, ministerial duty imposed by the terms of the act.

16. Further answering, respondent alleges that the language of section 13 of the act is permissive, not mandatory and has been so construed and acted upon by the Secretary of the Interior during the nine years intervening since the date of its passage:

SEC. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United State and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description
16 of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby: *Provided*, That in the Territory of Alaska prospecting permits not more than five in number may be granted to any qualified applicant for periods not exceeding

four years, actual drilling operations shall begin within two years from date of permit, and oil and gas wells shall be drilled to a depth of not less than five hundred feet, unless valuable deposits of oil or gas shall be sooner discovered, within three years from date of the permit and to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered, within four years from date of permit: *Provided further*, That in said Territory the applicant shall have a preference right over others to a permit for land identified by temporary monuments and notice posted on or near the same for six months following such marking and posting, and upon receiving a permit he shall mark the corners of the tract described in the permit upon the ground with substantial monuments within one year after receiving such permit."

This language plainly reposes in the Secretary of the Interior the discretion either to issue or decline to issue prospecting permits. Neither section 13 nor any other section, nor any rule or regulation promulgated in the administration of the act, vests any right in an applicant for a permit, to receive the same. On the contrary, section 2 of the regulations issued March 11, 1920, by the Secretary of the Interior under said act of February 25, 1920, reprinted and reissued by the Secretary of the Interior October 29, 1920, in force at date of petitioner's application, and still in force, expressly provides:

"It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant."

The securing of a permit or license to prospect public lands for oil and gas is a privilege and not a right. Petitioner does not allege that she had performed any work or expended any
17 money or other thing of value in, upon or for the development of the land described in the application, nor that she had surrendered to the United States any claim, right, or interest in this or other lands of the United States which would constitute a legal or equitable claim or right to receive the permit applied for; neither does she disclose that any right, of whatsoever nature, has been acquired by her to receive a permit, but she simply sets forth a state of facts which indicate that she has qualified as an applicant and thus placed herself in a position to receive a permit if and when issued by the Secretary of the Interior. Further than that, she shows no acquired status involving fixed or vested rights to enter public land of the United States. The petition therefore states no ground upon which the court will be justified in issuing the writ sought, commanding him either—

(*a*) To reinstate petitioner's application;
(*b*) To approve same; or
(*c*) To issue a prospecting permit to petitioner.

Wherefore respondent prays that the rule be discharged, the petition dismissed, and that petitioner take nothing herein; that respondent be permitted to go hence without day, with his costs.

RAY LYMAN WILBUR,
By JOS. M. DIXON,
Acting Secretary of the Interior.

18 DISTRICT OF COLUMBIA, *ss:*

Joseph M. Dixon, being first duly sworn on his oath, says that he has read the foregoing answer by him subscribed, and that he knows the contents thereof, and that the matters therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true.

JOS. M. DIXON,
Acting Secretary of the Interior.

Subscribed and sworn to before me this 27th day of June, 1929.

[SEAL.] WILLIAM H. REICHARD,
Notary Public.

Commission expires August 7, 1929.

19 Supreme Court of the District of Columbia

WEDNESDAY, *April 16, 1930.*

Session resumed pursuant to adjournment, Hon F. L. Siddons, justice presiding.

* * * * * * *

Come now here as well the relator, as the respondent, by their respective attorneys, and the said cause having come on for hearing upon the answer to the rule to show cause herein on the 28th day of February, 1930, whereupon, it having been agreed upon by counsel for the respective parties that the cause should come before the court as upon final hearing upon bill and answer, the court finds that the writ of mandamus should issue as prayed. Whereupon, the court being fully advised, and counsel having been fully heard for the respective parties, it is considered, ordered, and adjudged this 16th day of April, 1930, that the respondent, Ray Lyman Wilbur, be, and he is hereby commanded, within twenty days after this date to reinstate the application of Ethel M. McLennan, for prospecting permit filed under section 13 of the act of February 25, 1920 (41 Stat. 437), and proceed therewith according to law.

From the foregoing order and judgment the respondent in open court notes an appeal to the Court of Appeals this 16th day of April, 1930; the same is allowed by the court.

20 In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA, EX REL, ETHEL M. McLENNON, petitioner *v.* RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, respondent	At law No. 76,795.

Assignment of errors

Filed May 2, 1930

* * * * * * *

The respondent presents his assignment of errors as follows:

1. The court erred in finding for the petitioner and against the respondent and in granting the writ of mandamus herein.

2. The court erred in holding that the acts of the President of the United States and of the Secretary of the Interior in the premises, together, or separately, do not constitute a temporary executive withdrawal of the public lands subject to prospecting for oil and gas under the provisions of the act of February 25, 1920, commonly called the oil leasing act, from the purposes of said act.

3. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant.

4. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant in the absence of specific rules and regulations.

21 5. The court erred in holding that the provisions of the last subdivision of Rule 2 of the rules and regulations do not vest in the Secretary of the Interior discretion to refuse to grant any permit in the due exercise of his official duty.

O. H. GRAVES,
Attorney for Respondent.

22 In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA, EX REL, ETHEL M. McLENNON, petitioner
v.
RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, respondent
} At law No. 76,795

Designation of record

Filed May 2, 1930

The clerk in making up the transcript of record on appeal in the above-entitled cause, will include:

1. Petition and exhibits.
2. Answer and exhibits.
3. Opinion and judgment of the court.
4. Notation and allowing of appeal.
5. Assignment of errors.
6. This designation.

O. H. GRAVES,
Attorney for Respondent.

Service acknowledged this 22d day of April, 1930.

LEWIS E. HOFFMAN,
Attorney for Petitioner.

23 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered

from 1 to 22, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 76795 at law, wherein the United States of America, *ex relatione* Ethel M. McLennan is petitioner and Ray Lyman Wilbur, Secretary of the Interior, is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of June, 1930.

[SEAL.] FRANK E. CUNNINGHAM, *Clerk.*

(Indorsement on cover): District of Columbia Supreme Court. No. 5247. Ray Lyman Wilbur, Secretary, &c., appellant, *vs.* The United States of America, ex relatione Ethel M. McLennan. Court of Appeals, District of Columbia. Filed June 24, 1930. Henry W. Hodges, clerk.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Monday, October 6th, A. D. 1930.

* * * * * * *

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

vs.

U. S. ex Rel. ETHEL M. McLENNAN

On motion of Mr. Chester I. Long for leave to file brief and make oral argument as amicus curiæ, on behalf of the State of Colorado, in the above entitled cause, it is ordered by the Court that said motion be and it is hereby granted.

* * * * * * *

Tuesday, October 14th, A. D. 1930.

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYBON

And No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

On motion, William O. Wilson, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of the State of Wyoming.

On motion, P. Q. Nyce, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of Utah, New Mexico and Montana.

The argument in the above entitled causes was commenced by Mr. O. H. Graves, attorney for the appellants, and was continued by Mr. E. C. Finney, attorney for the appellants.

* * * * * * *

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Wednesday, October 15th, A. D. 1930.

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYBON

And No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

The argument in the above entitled causes was continued by Mr. James Conlon, attorney for the appellant in No. 5241, and by Mr. Lewis E. Hoffman, attorney for the appellant in No. 5247, and by Mr. James G. Leovy, attorney for the appellant in No. 5250, and by William O. Wilson, Esq., Attorney General of the State of Wyoming, as amicus curiæ, and by Mr. Peter Q. Nyce, as amicus curiæ, on behalf of New Mexico, Utah and Montana, and by Mr. Chester I. Long, as amicus curiæ, on behalf of the State of Colorado, and was concluded by Mr. E. C. Finney, attorney for the appellants.

* * * * * * *

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

And No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYBON

And No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

These cases were argued and presented with No. 5241, Wilbur v. Barton, just decided, and the decision in that case is controlling here.

The judgment in each case will be reversed, and the cause remanded.

Reversed.

Chas. H. Robb, Associate Justice.

For reasons stated in his dissenting opinion in No. 5241, Wilbur v. Barton, Mr. Justice Van Orsdel dissents.

Endorsed: Nos. 5247, 5250, 5251. Ray Lyman Wilbur, Secretary of the Interior, Appellant, v. United States of America ex relatione Ethel M. McLennan; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellants, v. W. B. Pyron; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellants, v. United States of America ex rel. H. H. Simpson. Opinion of the Court per Mr. Justice Robb. Court of Appeals, District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Monday, December 1st, A. D. 1930.

* * * * * * *

No. 5247, October Term, 1930

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione ETHEL M. McLENNAN

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia

and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Robb, December 1, 1930.

Mr. Justice Van Orsdel dissenting.

* * * * * * *

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5241

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Rel. ROY G. BARTON

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

Appeal from a Judgment in the Supreme Court of the District directing the issuance of a writ of mandamus to compel the Secretary of the Interior "to reinstate the application of the petitioner, Roy G. Barton, * * * and to proceed thereon according to law."

Should the judgment be affirmed, it probably would result in the reinstatement of "more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices."

The cause was heard on petition and answer. There is no dispute as to the facts, which are substantially as follows: On June 6, 1928, Barton filed an application in the Land Office at Las Cruces, New Mexico, for a permit to prospect for oil and gas in a certain described tract of public land of the United States (Act of February 25, 1920; 41 Stat. 437).

On March 13, 1929, the Department of the Interior released a "Memorandum for the Press," reading in part as follows: "Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending. These instructions are in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration.'"

On the same day a telegram was forwarded by the Department to the various United States land offices, including the land office at Las Cruces, New Mexico, reading in part as follows:

"No oil and gas prospecting permits will be issued on and after March 12, 1929. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked."

On March 16, 1929, Departmental Order No. 337 was issued, reading in part as follows:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department. There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications. Probably in none of the cases on hand has the applicant expended money for development purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application. * * * To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate

recommendations. Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. * * * No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929."

This Order also was incorporated in a "Memorandum for the Press" issued by the Department on the same day.

On March 26, 1929, the Commissioner of the General Land Office, "pursuant to instructions approved by the Secretary of the Interior March 13, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929, rejected" Barton's application. An appeal was taken, and the order of rejection was sustained by the Department in a decision dated September 4, 1929.

In his petition Barton avers "that there is nothing in or under the provisions of the act of February 25, 1920 (41 Stat. 437), * * * which requires your relator to make any substantial expenditures for reliable geological surveys upon the lands embraced in his oil and gas application * * * in order to entitle him to a permit for the lands described in said application;" and that "the Secretary of the Interior is without authority of law to reject his application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted, and March 16, 1929, also identified as Departmental Order No. 337."

The answer admits, for the purposes of this suit, that Barton "was duly qualified under the law to receive the permit for which he applied; that at all times relator (Barton) was and is now ready, able, and willing to comply with all regulations made pursuant to the said act of Congress respecting the duties and obligations of permittee."

Did the orders of the Secretary of the Interior amount to a temporary withdrawal of the public land from location, entry, and exploration for the purpose of discovering oil or gas; and, assuming the withdrawal, did the mere filing of an application for a prospecting permit initiate a right in the applicant that could not be affected by the withdrawal?

The Act of June 25, 1910 (36 Stat. 847), "to authorize the President of the United States to make withdrawals of public lands in certain cases," reads in part as follows:

"Be it enacted * * *, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Prior to 1910 the President had acted in scores of cases without express statutory authority, and in United States v. Midwest Oil Co., 236 U. S. 459, his authority to make such withdrawals was expressly sustained.

There can be no doubt that the effect of the orders issued by the Secretary was to withdraw from further location, entry, and exploration for the discovery of oil and gas all public land, and that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest. That such was the intent of the Secretary and the understanding of the public is equally plain. It is immaterial that the orders were not limited as to time, for the Act of 1910 provides that such withdrawals or reservations shall remain in force until revoked by the President or by an Act of Congress.

The next question to be determined is whether the withdrawal of the Secretary was the withdrawal of the President. It is settled law that "the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties" (Wilcox v. Jackson, 13 Pet. 498), and that "the acts of the heads of departments, within the scope of their powers, are in

law the acts of the President" (Wolsey v. Chapman, 101 U. S. 755, 769). In the case last mentioned it was held that the order of the Secretary of the Interior, directing that the lands on the Des Moines River above the Raccoon Fork be reserved from sale, was in contemplation of law the order of the President and had the same effect as the proclamation mentioned in the Act of September 4, 1841 (5 Stat. 453). The Court said:

"A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we can not doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act."

See also United States v. Morrison, 240 U. S. 192; Northern Pacific Railway Co. v. Wismer, 246 U. S. 283; Relation of the President to the Executive Departments, 7 Op. Atty. Gen. 453.

In the present case the orders of the Secretary gave effect to the previously announced policy of the President, were acquiesced in by him, and were in legal contemplation his acts. Was the President vested with such authority?

It is not contended that the Act of June 25, 1910 (36 Stat. 847), expressly authorizing the President to make temporary withdrawal "from settlement, location, sale, or entry any of the public lands of the United States", has been repealed. The contention is that the Act of February 25, 1920 (41 Stat. 437), "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain", and providing that public lands containing deposits of such

minerals "shall be subject to disposition in the form and manner provided by this Act", was mandatory, and that the President was without power to withdraw such lands from disposition as provided in the Act. Sec. 13 of that Act, relating to oil and gas, provides in part "that the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * *. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; * * *".

Sec. 14 provides in part that "upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: * * *."

There is no provision in the Act purportin to repeal or modify the Act of 1910, and in our view such a modification may not be implied. The provision in the first section that the lands containing certain named mineral deposits "shall be subject to disposition in the form and manner provided by this Act" is general, and no more mandatory than was the provision in the Act of 1872 (17 Stat. 91, R. S. 2319, 2329) declaring all public lands containing petroleum or other mineral oils to be "free and open to occupation, exploration and purchase by citizens of the United States * * * under regulations prescribed by law"; and yet the President withdrew without direct congressional authority such public lands, and his action was sustained in the Midwest case (236 U. S. 459). But it is insisted that the Act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry", and that the application for permit and the lease which may follow discovery of oil under the Act of 1920 are not embraced within those terms. It is apparent, we think, that the Act of 1910 was intended to be of wide scope and recognized the author-

ity of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.

In Mason v. United States, 260 U. S. 545, by Executive order dated December 15, 1908, lands had been "withdrawn from settlement and entry, or other form of appropriation." It was contended that this order did not include appropriations by mining locations. The Court observed:

"The words 'settlement and entry', it is said, apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; that mining lands are acquired, not by settlement or entry, but by location and development; that *that* this process is not covered by the words 'other form of appropriation', limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. * * * *If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized?* (Italics ours.) None has been suggested and we can think of none. * * * Moreover, the circumstances leading up to and accompanying the issuance of the order demonstrate conclusively that its main, if not its only, purpose was to preserve from private appropriation the oil and gas which the lands were thought to contain pending investigation and congressional action, and this purpose would have been subverted by appropriations of the nature here involved quite as much as by other forms. We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order and consequently were prohibited by it."

Under the Act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. This, we think, was akin to location or entry, as used in the Act of 1910.

If, as suggested by counsel for appellee, the Act of 1910 has no application, then it well might be held that an implied power to withdraw was reposed in the President under the Act of 1920. United States v. Midwest Oil Co., 236 U. S. 459.

Under the general mining laws a citizen was free to go upon the public domain. He did the work necessary to discover minerals, staked his claim, recorded notice in the mining district or county records, and his rights became fixed. Forbes v. Gracey, 94 U. S. 762; Belk v. Meagher, 104 U. S. 279. This was true as to public lands containing oil and gas until the Act of February 25, 1920 (41 Stat. 437). Under the provisions of that Act, as already appears, a citizen no longer has a right to go upon public lands of the United States to prospect for oil or gas, unless permitted to do so by the Secretary of the Interior, under such "proper rules and regulations as he may prescribe" (Sec. 13). It is at once apparent that there is a marked distinction between the old law and the new. Under the old law a citizen was free to make explorations as a matter of right. Under the new law he must apply for the privilege. Until that privilege is granted, through the issuance of a permit, he has no vested interest. It is apparent, we think, that Congress recognized the distinction between the old law and the new and that the President might at any time, if conditions changed, withdraw the public lands from exploration. Under Sec. 13 the Secretary is "authorized" to grant prospecting permits. Under Sec. 14, if a permit has been granted and the permittee has incurred the expense incident to the exploration and discovery of "valuable deposits of oil or gas", he "shall be entitled to a lease." Thus Congress recognized that the mere filing of an application for a permit confers no vested right upon the applicant, but that if a permit be issued and he goes on the land and makes a discovery he has such an interest as must be recognized.

Congress, of course, knew that, if changed conditions rendered advisable the temporary withdrawal by the Executive of the public lands from further exploration, thousands of such applications for permits might be pending. It was careful, therefore, to distinguish between an application for a permit, and the rights that might be acquired under an issued permit. Every applicant for a permit was charged with knowledge that the Executive might temporarily withdraw the lands from further exploration, and that his application was, therefore, subject to such authority of the Executive. We rule that the order of the Secre-

tary rejecting Barton's application for a permit was a valid exercise of power by the Executive.

Mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, to remedy and not to promote a wrong, to compel the performance of an actual duty rather than to direct the performance of an act which will work public or private mischief. While classed as a legal remedy, its issuance is largely governed and controlled by equitable principles. Duncan Townsite Co. v. Lane, 245 U. S. 308; Arant v. Lane, 249 U. S. 367; Ex Parte Skinner & Eddy Corp., 265 U. S. 86; Work v. Rives, 267 U. S. 175; Payne v. United States, 50 App. D. C. 119, 269 F. 198; Morgan v. Howard, 54 App. D. C. 3, 293 F. 650; Stowell v. Deming, 57 App. D. C. 223, 19 F. (2d) 697. In the exercise of a sound judicial discretion, the court must be controlled by settled legal principles.

As observed in the Midwest case (236 U. S. 471):

"The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large."

In the present case, his orders, issued through the Secretary, were intended to meet an emergency occasioned by the great over-production of oil and gas, the waste incident thereto, and other public considerations. There was available to him the advice of the Attorney General on all questions of law that might be involved. It was necessary to interpret the applicable statutes, and we have expressed the view that they were correctly interpreted; but, in any event, it would require a very clear case to justify a court in arresting and suspending the action of the Executive taken in the public interest. The record does not present such a case.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Chas. H. Robb, Associate Justice.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Department of the Interior, Appellant, v. United States

of America ex relatione Roy G. Barton. Opinion of the Court per Mr. Justice Robb. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Number 5241

Mr. Justice VAN ORSDEL, dissenting:

I am compelled to dissent from the opinion and judgment of my associates.

It is conceded that the applicant Barton possessed all the qualifications necessary under the Leasing Act to entitle him to a permit. In other words, but for the order of the Secretary suspending the operation of the Leasing Act, he would have been compelled to grant Barton's application. We start, therefore, with an applicant entitled to a permit at the time the order was made suspending the provisions of the Leasing Act.

The Act of 1910, vesting authority in the President to withdraw public lands from "settlement, location, sale, or entry", specifically provides the terms upon which this Executive authority may be exercised. It must be done by a formal proclamation, which the Secretary of the Interior is required, by the terms of the Act, to report to Congress at the next regular session after the date of withdrawal. Prior to the enactment of this statute, lands had been withdrawn by proclamation of the President without any particular authority of statute. Congress, therefore, in the 1910 Act, manifested a clear intention to keep control of the withdrawals of public lands to the extent of specifying the manner and terms under which they could be withdrawn by the President, and in addition requiring notice to be given it of such withdrawals by the Secretary of the Interior in order that the action of the President, if deemed advisable, might be promptly revoked.

This brings us to what was done in this case. No proclamation, formal or otherwise, was ever issued by the President, and no notice of any proclamation was given Congress by the Secretary, as required by the 1910 Act. The order of the Secretary, telegraphed the local land

officers, was based upon the following newspaper report under date of March 12, 1929, purporting to express the views of the President:

"There will be no leases or disposal of government oil lands, no matter what category they may lie in, of government holdings or government controls, except those which may be mandatory by Congress. In other words, there will be complete conservation of government oil in this administration."

It will be observed that this merely purports to state a future policy which the President might or might not adopt in respect to government oil lands. It was not transmitted by the President to the Secretary of the Interior. The information upon which he based his order was obtained exclusively through the press. The press report merely referred to a declaration said to have been made by the President, which he could only make effective by a formal proclamation. There was, therefore, no proclamation whatever under the terms of the 1910 Act which would justify in the remotest degree the action taken by the Secretary of the Interior.

Neither can the action of the Secretary be upheld under the doctrine of acquiescence. It is undoubtedly true that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President". The President is the head of the Executive Department of the government, and the lawful acts of his subordinates will be presumed to be his acts, but this presumption does not extend to unlawful acts of subordinates. The difficulty here is that the Secretary acted without the scope of his power in the suspension of the oil leasing act. He was totally without power to act until certain statutory conditions had been complied with; namely, the issue of a proclamation by the President.

The cases relied upon in the majority opinion are not in point. In Wilcox vs. Jackson, 13 Pet. 498, a preemption entry had been made upon land set aside and occupied for more than twenty years as a military reservation, on which the government had expended large sums of money under the direction of the Secretary of War. Of course, a long

continued use of public land by the government itself for military purposes, or for other purposes, would constitute an occupancy by the government on its own land, amounting to a withdrawal of the land from entry and settlement; and, whether done by direct authority of the President or by the lawful act of the Secretary of War, the President, after this long lapse of time, would be assumed to have acquiesced in the withdrawal and occupation of the land.

The case of Wolsey vs. Chapman, 101 U. S. 755, has even less application to the present case than does the Wilcox case. Here, a large tract of land had been granted to the Territory of Iowa for the development of navigation on the Des Moines river. The execution of the Act was delegated to the Secretary of the Interior, and was accordingly within the lawful scope of the authority vested in him. A controversy arose as to the limits of the land granted—whether it extended beyond a point in the river known as Raccoon Fork. The matter required determination from many angles by the Department of the Interior, and, to protect the interests of all concerned, the Secretary suspended settlement on the lands in question until the matter could be legally determined. It was said, and properly so, that the act of the Department, being within the scope of its powers, would be regarded in law as the act of the President. The difference between that case and the one at bar is that here there is only one law under which a withdrawal such as we are here considering can be made; namely, through the Proclamation Act of 1910. This act is a specific grant of power by Congress to the President by which he may in his discretion withdraw public lands from entry, sale, or settlement. Being a grant of power belonging to Congress, it should strictly be complied with, and the courts will not imply compliance from circumstances such as those involved in this case.

The case of United States vs. Midwest Oil Company, 236 U. S. 459, has little or no analogy to this case. There, the proclamation of the President, issued before the enactment of the 1910 statute, hence without specific statutory authority, described accurately the territory withdrawn, the character of the land, and the object of withdrawal. The President, doubtful of his authority in the premises, submitted

the whole matter to Congress for its approval. It resulted in the prompt enactment of the 1910 statute. The proclamation was prepared with all the formalities and dignity of a document promulgated by the President with a view to affecting great public and private interests. In that case the oil company entered upon the lands after the proclamation was issued. The court, in its opinion, strongly implied that if the entry upon the lands had been made prior to the issuance of the proclamation by the President, it would have had a different case. Here the application was filed prior to the order of the Secretary, and here there was no proclamation whatever as required by statute.

It is not true that the applicant was required to do nothing on the land before filing his application for a permit. He was required by the Leasing Act to seek out the location, to post notices, giving a description of the land for which application would be made,—if surveyed land by the lines of survey; if unsurveyed, by descriptive metes and bounds. This constituted an entry upon the land, which developed into a right with the filing of the application of which the applicant cannot be divested by any act of the Executive Department. This is settled law by numerous decisions of the Supreme Court as to entry upon public lands, such as homestead, preemption, etc. Entry upon oil lands is in every respect entitled to the same legal significance as entry upon lands for the purpose of acquiring title. In Mason v. United States, 260 U. S. 545, it was contended that the words "settlement and entry" applied only to the act of settling upon the soil and making entry in the land office, and that it did not apply to mining lands which it was contended were not acquired by settlement and entry but by location and development, but the court said:

"If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested and we can think of none."

This is not an action to mandamus the President. The writ runs against the Secretary of the Interior and the Commissioner of the General Land Office. The President, so far as I am able to observe, has had nothing to do with this case. The case grew out of orders originated in the Land Department, based upon newspaper rumor; and the

action here is to compel the Secretary of the Interior and the Commissioner of the General Land Office to perform purely administrative duties imposed upon them by law. That mandamus will lie for this purpose is too elementary to require citation of authority. While the judgment is to require a departmental officer to perform a purely administrative duty imposed by Congress, the court has no power under the sanction of "judicial discretion" to withhold its mandate, even though, in its judgment, to compel the enforcement might not be in the public interest. The policy of the law belongs to the legislative and not the judicial department of the government.

The court is called upon here to determine purely questions of law, and it is immaterial whether one, or five-thousand, or ten-thousand applicants would be affected by the court's decision. Neither, in the agitated state of the public mind, should the fact that this is an "Oil Case" entitle it to any particular sanctity in the eyes of the law, or furnish adequate ground for the wholesale slaughter of private property rights by judicial decree. The present inquiry is limited to determining the important questions of law here involved. It would seem, therefore, unnecessary to consider the facts stressed in the majority opinion "that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest"; or that, if the judgment be affirmed in this case, "it would probably result in the reinstatement of 'more than five-thousand applications for oil and gas permits on the public lands pending in the Land Office in Washington, and an unknown number in the field offices' ".

These might furnish commendable reasons for a proper and lawful withdrawal of the lands either by formal proclamation of the President or by Act of Congress, but we have hardly reached the period where the laws of the land can be suspended or repealed by the arbitrary methods here employed.

For the reasons stated, the judgment should be affirmed.

Josiah A. Van Orsdel, Associate Justice.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Interior, Appellant, v. United States of America ex rel. Roy G. Barton. Dissenting Opinion per Mr. Justice Van Orsdel. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Memorandum opinion by Mr. Justice Siddons, of the Supreme Court of the District of Columbia, as it appears in the printed record in case No. 5250 in the Court of Appeals of said District, entitled Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, appellants, vs. W. B. Pyron, which opinion is included in this transcript by designation of counsel

MEMORANDUM ON SUBMISSION AFTER FINAL HEARING—Filed Apr. 15, 1930

* * * * * * *

The above-entitled case, together with the cases of McLennan *v.* Wilbur, No. 76795; Retherford *v.* Wilbur, No. 76911 and Paris *v.* Wilbur, No. 77213 were submitted for final hearing. A waiver of a jury trial has been filed and the oral testimony of one witness has been heard in the instant case. In the three other cases referred to no issues of fact are involved.

These four cases present the same question and it is primarily a question of law. Similar cases involving the same question had previously been heard and submitted to Mr. Justice Bailey, and on April 8th, last, he filed an opinion in the two cases submitted to him, in which he held that the writ of mandamus should issue directing the Secretary of the Interior to reinstate the applications of the relators and to proceed therewith according to law. In that opinion the writer of the present memorandum concurs, both in its reasoning and in the conclusions reached by the learned justice.

This memorandum is to be taken as applying to all of the four cases submitted to him as stated above. The writer desires now in a few sentences, to emphasize certain phases of the matter.

The act of Congress, which is invoked by the relators in the pending cases, was approved February 25, 1920, and, as pointed out by Justice Bailey in his opinion, the act is entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." We are only concerned now with those provisions of the act which deal with oil and gas permits.

The act authorizes the Secretary of the Interior to promulgate necessary and proper rules and regulations to gov-

ern in the execution of the statute. (Section 32.) Pursuant thereto the Secretary promulgated oil and gas regulations under date of March 11, 1920. These regulations occupy some twenty-five printed pages, and there has also been published by the Secretary, in the form of an appendix to his regulations, a digest of opinions and decisions in connection with the administration of the act of Congress mentioned, as applied to oil and gas. This appendix was approved by the Secretary of the Interior under date of October 6, 1920, and contains thirteen printed pages. We find in regulation No. 3 language in substance to the effect that the granting of a permit or lease for the development or production of oil or gas will not preclude other permits or leases of the same land for the mining of other minerals under the act, "all to the end that the full development of the mineral resources may be secured." On page 36 of the appendix, above mentioned, we find it again declared, in effect, that the purpose of the act was "to the end that the best development of the lands, both for mineral and agricultural purposes, may be accomplished." We thus have constructions by the Secretary of the Interior of the purpose of the legislation in question, that it is that the full development of the mineral resources may be secured.

With scrupulous care the act reserves certain lands from its operation by "excluding lands acquired under the act known as the Appalachian Forest Act, approved March 1, 1911 (36 Statutes, 961), and those in national parks, and in land withdrawn or reserved for military or naval uses or purposes, except as herein provided." (Section 1.) It enacts that the act shall operate upon deposits of oil, oil shale, or gas, and lands containing such deposits owned by the United States including those in national forests.

The duty of executing the provisions of this act is conferred upon the Secretary of the Interior, and nowhere in the act, in the opinion of the court, is any power to suspend its operation or dispense with its execution conferred upon him. And this court is further of the opinion that no power resides in either the executive or judicial branches of the Government to suspend or dispense with the execution, administration, and enforcement of a constitutionally enacted law of the Congress.

In each of the four cases mentioned above the writ of mandamus will issue, in the McLennan, Retherford, and

Paris cases, directing the Secretary of the Interior to reinstate the applications of relators and proceed therewith according to law, and in the Pyron case directing the Secretary of the Interior to accept for filing and file the application of relator and proceed therewith according to law.

Orders accordingly will be settled and signed on presentation and notice.

F. L. Siddons, Justice.

April 15, 1930.

Opinion of Mr. Justice Bailey, of the Supreme Court of the District of Columbia, as it appears in the record in case No. 5241 in the Court of Appeals of said District, entitled Ray Lyman Wilbur, Secretary of the Interior, appellant, vs. United States of America ex relatione Roy G. Barton, and also as it appears in the record in case No. 5242 in said Court, entitled Ray Lyman Wilbur, Secretary of the Interior, appellant, vs. United States of America ex relatione Richard D. Vedder, which opinion is included in this transcript by designation of counsel.

OPINION—Filed April 8, 1930

* * * * * * *

The act of Congress of February 25, 1920, provides "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian Forest act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States," etc. The title of the act is "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," and its purpose is clearly to promote the prospecting for oil, gas, etc., on public lands, not theretofore known to be productive of minerals of this character. Section 13 of this act provides "That the Secretary of the Interior is hereby

authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act, a prospecting permit," etc.

The Secretary contends that Congress by the use of the word "shall" in the one case and the words "is hereby authorized" in the other intended that the granting of permits should be wholly in the discretion of the Secretary and that he could at all times and for any reason refuse to issue permits and entirely suspend the operation of the statute. But that the purpose of the act was "that the full development of the mineral resources may be secured," was recognized in these words by the Secretary in the regulations made by him under this act (No. 3). It is true that in rule No. 2 the Secretary did provide, "It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant." It is only recently, however, that the contention has been made that under this provision the Secretary may refuse to grant any permits at all. While it may be that the Secretary may deny individual applications "as the facts may be deemed to warrant," his discretion is not to be exercised arbitrarily and without regard to law, as is shown by the decision of the Court of Appeals in the Alling case. That the use of the words "is authorized" above does not necessarily vest him with such discretion as is claimed by him, is shown by the use of the same expression in section 32 of the act of 1920, where it is clearly mandatory. As to the effect under any construction of rule 2 it may be said that the Secretary can not add to his powers by any rule or regulation made by him.

In my opinion this act does not give the Secretary of the Interior nor the President any such power as is claimed by the Secretary. I think that the discretion vested in the Secretary is a judicial one and not an absolute one; that the word "authorized" in section 13 of the act refers to the manner of granting permits, the determination of the qualifications of the applicants, and matters of that nature under the rules and regulations promulgated by him and that the decision in the Alling case is conclusive of this question.

The authority given to him by Congress is that he may "do any and all things necessary to carry out and accomplish the purpose of this act," and not to defeat the will of Congress by suspending its operation.

Any authority then for the action by the Secretary of the Interior must be found in the act of 1910, which fixed the power of the Executive to withdraw any part of the public domain from settlement, etc. But as to this it is sufficient to say that the action of the Secretary does not constitute a withdrawal under that act. It can not be held to be such a withdrawal, for it does not appear to be of temporary nature; the lands withdrawn are not withdrawn from either settlement, location, sale, or entry; the purpose of the withdrawal is not for any of the purposes specified in that act; these purposes are not specified in the order of withdrawal; and the withdrawal was not reported to Congress in accordance with the act. In addition, it may be said that it is by no means clear that the President has authorized the Secretary of the Interior to make the withdrawal. The latter bases his authority upon a newspaper report of a statement made by the President and does not set up any direct order of the President to himself either orally or in writing.

A writ of mandamus will issue in each case directing the Secretary of the Interior to reinstate the applications of the relators and to proceed therewith according to law.

Bailey, Justice.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione ETHEL M. McLENNAN, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States

in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.

1½. Minute entry allowing Chester I. Long to appear, etc., as amicus curiæ.

2. Minute entry showing argument of cause.

3. Judgment or decree of the Court.

4. Opinion of this Court and dissenting opinion in the case of Ray Lyman Wilbur, Secretary of the Interior, Appellant, vs. United States of America, ex rel. Roy G. Barton, Appellee, No. 5241.

5. Opinion of Mr. Justice F. L. Siddons, dated April 15, 1930, in the Supreme Court of the District of Columbia in the case of W. B. Pyron vs. Ray Lyman Wilbur, Secretary of the Interior, et al, at Law No. 77,631, being part of the printed transcript of record in No. 5250 of this court.

6. Opinion of Mr. Justice Jennings Bailey, dated April 8, 1930, in the Supreme Court of the District of Columbia, in the case of United States Ex Rel. Richard D. Vedder vs. Ray Lyman Wilbur, Secretary of the Interior, at Law No. 77,638, and United States Ex Rel. Roy G. Barton vs. Ray Lyman Wilbur, Secretary of the Interior, at Law No. 77,386, being part of the printed transcript of record in No. 5241 of this court.

7. This designation.

8. Clerk's Certificate.

L. E. Hoffman, Attorney for Appellee.

A copy of the foregoing acknowledged this 5 day of December, 1930.

O. H. Graves, Attorney for Appellant.

[Endorsed:] In the Court of Appeals of the District of Columbia. No. 5247. Ray Lyman Wilbur, Secretary of the Interior, Appellant, vs. The United States of America Ex Relatione Ethel M. McLennan, Appellee. Designation of Record. Lewis Edwin Hoffman, People's Life Insurance Bldg., Washington, D. C. Law offices Long, Chamberlain & Nyce, National Press Building, Washington, D. C. Court of Appeals, District of Columbia. Filed Dec. 5, 1930. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered 1 to 42, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of Ray Lyman Wilbur, Secretary of the Interior Department, Appellant, vs. The United States of America ex relatione Ethel M. McLennan, No. 5247, October Term, 1930, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 8th day of December, A. D. 1930.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. [Seal Court of Appeals, District of Columbia.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618.

UNITED STATES OF AMERICA, EX REL., ETHEL M. McLENNAN, *Petitioner*,

v.

RAY LYMAN WILBUR, *Secretary of the Interior.*

No. 676.

UNITED STATES OF AMERICA, EX REL., H. H. SIMPSON, *Petitioner*,

v.

RAY LYMAN WILBUR, *Secretary of the Interior*, AND CHARLES C. MOORE, *Commissioner of the General Land Office.*

No. 704.

UNITED STATES OF AMERICA, EX REL., ROY G. BARTON, *Petitioner*,

v.

RAY LYMAN WILBUR, *Secretary of the Interior.*

No. 743.

UNITED STATES OF AMERICA, EX REL., W. P. PYRON, *Petitioner*,

v.

RAY LYMAN WILBUR, *Secretary of the Interior*, AND CHARLES C. MOORE, *Commissioner of the General Land Office.*

AMICI CURIAE.

State of Montana,
By: L. A. Foot,
Its Attorney General.
State of Wyoming,
By: J. A. Greenwood,
Its Attorney General.
State of New Mexico,
By: E. K. Neumann,
Its Attorney General.
State of Utah,
By: George P. Parker,
Its Attorney General.
State of Colorado,
By: Clarence L. Ireland,
Its Attorney General.
Of Counsel:
Peter Q. Nyce.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618.

UNITED STATES OF AMERICA, EX REL., ETHEL M. McLENNAN, *Petitioner,*

v.

RAY LYMAN WILBUR, *Secretary of the Interior.*

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v.

RAY LYMAN WILBUR, *Secretary of the Interior.*

No. 743.

UNITED STATES OF AMERICA, EX REL., W. P. PYRON, *Petitioner,*

v.

RAY LYMAN WILBUR, *Secretary of the Interior,* AND CHARLES C. MOORE, *Commissioner of the General Land Office.*

MOTION TO ADVANCE.

Come now the petitioners in the above entitled causes and move that they be advanced for early

hearing, and in support of their motion make the following brief statement of the matters involved and the reasons relied on for the advancement:

1. The question involved is whether there has been such a withdrawal of the public lands of the United States as to warrant the Secretary of the Interior in suspending the Leasing Act of February 25, 1920 (41 Stat. 437, U. S. C. A. Title 30, Sections 181, *et seq.*) by refusing to issue oil and gas prospecting permits thereunder.

2. The question involved in these cases is of great and general importance to the so-called public land States including the States of Wyoming, Utah, Colorado, New Mexico and Montana, which said States appear as *amici curiae* in this litigation. These States have been and are being irreparably injured through loss of revenues which would accrue to said States under Section 37 of the General Leasing Act. Such loss of revenues and deprivation of the rights of said States will necessarily continue until the above cases are disposed of by this Court.

3. The administration of the Leasing Act by the Department of the Interior involving several million acres of public domain is in a confused state, and until the law has been finally determined, its orderly administration cannot be had.

4. Approximately two hundred similar cases to these are now pending in the Supreme Court of the District of Columbia awaiting the decision of this Court on the questions involved herein.

WHEREFORE, petitioners pray that these cases

be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

UNITED STATES OF AMERICA, EX REL., ETHEL M. MCLENNAN, *Petitioner*,
By: LEWIS EDWIN HOFFMAN,
CHESTER I. LONG,
her Counsel.

UNITED STATES OF AMERICA, EX REL., H. H. SIMPSON, *Petitioner*,
By: HOMER HENDRICKS,
DONALD V. HUNTER,
JAMES C. SHEPHERD,
his Counsel.

UNITED STATES OF AMERICA, EX REL., ROY G. BARTON, *Petitioner*,
By: JAMES CONLON,
his Counsel.

UNITED STATES OF AMERICA, EX REL., W. P. PYRON, *Petitioner*,
By: JAMES LEOVY,
JOHN W. FISHER,
his Counsel.

REQUEST OF STATES THAT MOTION TO ADVANCE BE GRANTED.

The States of Wyoming, Utah, Colorado, New Mexico and Montana, by their Attorneys General, hereby adopt the motion to advance filed in the above cases and urge that said cases be heard at an early date.

STATE OF UTAH,
By: GEORGE P. PARKER,
Its Attorney General.

STATE OF COLORADO,
By: CLARENCE L. IRELAND,
Its Attorney General.

STATE OF MONTANA,
By: L. A. FOOT,
Its Attorney-General.

STATE OF WYOMING,
By: J. A. GREENWOOD,
Its Attorney General.

STATE OF NEW MEXICO,
By: E. K. NEUMANN,
Its Attorney General.

Of Counsel:
PETER Q. NYCE.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618

THE UNITED STATES OF AMERICA,
EX RELATIONE ETHEL M. McLENNAN,
Petitioner,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

LEWIS EDWIN HOFFMAN,
CHESTER I. LONG,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ——

——

THE UNITED STATES OF AMERICA,
EX RELATIONE ETHEL M. MCLENNAN,
Petitioner,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petition of the United States of America Ex Relatione Ethel M. McLennan, respectfully shows to this Honorable Court:

Summary Statement of the Matters Involved.

This action was originally brought in the Supreme Court of the District of Columbia to compel the Sec-

retary of the Interior, by writ of mandamus, to issue an oil and gas prospecting permit, under the Act of February 25, 1920, to Ethel M. McLennan, who filed application therefor on October 29, 1928 (R. 2).

The lands covered by her application had previously been included in an oil and gas prospecting permit, which was canceled by the Secretary of the Interior, effective October 29, 1928 (R. 2). At a drawing held on that date, in accordance with instructions from the Secretary of the Interior, Ethel M. McLennan was found to be the successful applicant (R. 3). Said application was duly transmitted to the Commissioner of the General Land Office for consideration and issuance of permit, but by letter of March 26, 1929, addressed to the Register, Sacramento, California, which letter was approved by the respondent, the Commissioner of the General Land Office, rejected said application for permit on the ground that the respondent had ordered that "no oil and gas prospecting permits will be issued after March 12, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929 (R. 4).

Petitioner brought the action above referred to and the Supreme Court of the District of Columbia, on the 15th day of April, 1930, in an opinion by Mr. Justice F. L. Siddons in the case of W. B. Pyron v. Ray Lyman Wilbur, et al., No. 77631, which case was considered by the Supreme Court in conjunction with the case of Ethel M. McLennan, directed that a writ of mandamus issue against the respondent to compel him to reinstate Ethel M. McLennan's application for permit and proceed therewith according to law (R. 33). Said decision was to the effect that re-

spondent had no power to suspend or dispense with the execution, administration, and enforcement of a constitutionally enacted law of Congress: to-wit, the Leasing Act of February 25, 1920 (41 Stat. 437). From the decision of the Supreme Court of the District of Columbia an appeal was taken to the Court of Appeals (R. 12). Said appeal was considered by the Court of Appeals in conjunction with the case of Ray Lyman Wilbur v. Roy G. Barton, et al., in which case Mr. Justice Jennings Bailey of the Supreme Court of the District of Columbia, in an opinion dated April 8, 1930, directed that a writ of mandamus issue against the respondent to reinstate the applications for permit and proceed therewith according to law. Said opinion held in effect that respondent could not defeat the will of Congress by suspending the operations of the Leasing Act and the action of respondent did not constitute a withdrawal of public lands from the filing of applications for oil and gas prospecting permits under the Act of February 25, 1920 (R. 37).

Under Section 35 of the Leasing Act, the public land states are entitled to receive 37½ per centum of the royalties accruing to the Government from production of oil and gas in those states. Such money is to be used for the construction and maintenance of public roads, the support of public schools or public educational institutions as the various state legislatures may direct. They are also interested in taxes accruing from property used in the states in oil and gas operations and the relief from unemployment as a result of such operations.

The action of the Secretary in promulgating Orders No. 337 (R. 4) and 338 (Exhibit "A"), in re-

fusing to issue further prospecting permits which may ripen into leases, very vitally affects said public lands states by the elimination of royalties, taxes and employment.

On such showing of a great public interest, the Court of Appeals allowed the States of New Mexico, Montana, Wyoming, Utah and Colorado to file briefs as amicus curiae and take part in the oral argument of these cases (R. 15, 16).

All of the appeals above referred to were considered jointly in the Court of Appeals of the District of Columbia and on December 1, 1930, the Court rendered its decision reversing the lower court and remanding the cause for further proceedings (R. 19). Mr. Justice Van Orsdel of said Court filed a dissenting opinion (R. 28).

Reasons Relied on for the Allowance of the Writ of Certiorari.

I.

The importance of the questions involved in this case cannot be overstated. They relate to a suspension of the Act of February 25, 1920, by Orders Nos. 337 and 338, made by the Secretary of the Interior on March 16th and 20th, 1929. By said orders all pending applications for prospecting permits were rejected and all future applications were refused. They involve the authority of the Secretary of the Interior to suspend an Act of Congress. Petitioner contends that he has no such authority either by the act involved or the regulations made under it.

The District Court of Appeals by its decision reversing the lower court held that the Secretary of the

Interior could by promulgating Orders Nos. 337 and 338 suspend the operation of the act of Congress of February 25, 1920, and refuse to receive, file and consider on their merits applications for oil and gas prospecting permits under said act.

II.

Another claim advanced in the argument of the case before the District Court of Appeals was that the Orders of the Secretary were in fact a withdrawal of the public lands involved, under the Act of June 25, 1910. Petitioner contends that it was not the purpose of the Secretary to withdraw said lands under that Act, as the requirements of the Act were not complied with in any particular.

The Court of Appeals, by its decision, held that the Secretary of the Interior did withdraw the public lands of the United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, by virtue of the power vested in the President of the United States to withdraw public lands from "settlement, location, sale or entry", (a) despite the fact that no report of such withdrawal under the Act of June 25, 1910, has been made to Congress under the terms of said act, and (b) that no proclamation, formal or otherwise, was ever issued by the President and no notice of any proclamation was given Congress by the Secretary as required by the Act of June 25, 1910.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the District of Columbia commanding that court to certify and to send to this court for its re-

view and determination on a day certain to be therein named, full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5247, Ray Lyman Wilbur, Secretary of the Interior, Appellant v. United States of America, Ex Relatione Ethel M. McLennan, Appellee, and that said judgment of the Court of Appeals of the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ETHEL M. MCLENNAN,

By Counsel for Petitioner,

LEWIS EDWIN HOFFMAN.
CHESTER I. LONG.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1. The Opinions of the Court Below.

The opinion in the Court of Appeals of the District of Columbia was rendered December 1, 1930 (R. 19). The opinion of the Supreme Court of the District of Columbia was rendered on April 15, 1930 (R. 33).

2. Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. 19).

Jurisdiction of this court is invoked under section 240 (a), Judicial Code as amended by the act of February 13, 1925.

3. Statement of the Case.

The statement of the case has been given in the petition and in the interest of brevity will not be repeated here.

4. The Questions Presented.

The question involved in this case is whether the Secretary of the Interior under Section 13 of the Oil Leasing Act can refuse an application for prospecting permit filed under that act, without cause, not because of any disqualification of the applicant; not because the lands are not subject to issuance of prospecting permit; but because of a policy adopted by him and not by Congress; or can the Secretary of the Interior suspend an act of Congress without legislative authority.

Another question has been discussed in the briefs and opinions, to-wit: That the lands were withdrawn under the act of June 25, 1910. The answer to the petition in this case does not set up the question of withdrawals. The answer was based upon the exercise of discretion by the Secretary of the Interior which he claims to possess under Section 13 of the Oil Leasing Act.

5. Specifications of Error.

The Court of Appeals of the District of Columbia erred:

1. In reversing the decision of the Supreme Court of the District of Columbia.

2. In refusing to compel the Secretary of the Interior to reinstate petitioner's application for permit and proceed therewith according to law.

3. In holding that the Secretary of the Interior has authority to suspend or dispense with the execution, administration and enforcement of the act of Congress of February 25, 1920.

4. In holding that the act of the Secretary of the Interior was the act of the President, even though the Secretary acted without the scope of his authority.

5. In holding that the action of the Secretary of the Interior was a withdrawal of public lands under the act of Congress of June 25, 1910, even though the terms of said act were not complied with in that the President issued no formal proclamation and the Secretary of the Interior has not transmitted to Congress a report as to said withdrawals.

ARGUMENT.

THE DISCRETION OF THE SECRETARY OF THE INTERIOR.

Petitioner contends first that the Secretary has no discretion under the Oil Leasing Act to suspend it; second, he possesses no such discretion under Circular 672 which is the regulation under said Act. The title of the Act is "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain." From the title of the Act the policy is to promote the mining of minerals, above named, and not to discourage the mining of these minerals by suspending the operation of Section 13 of the Act.

Section 1 of the Act is as follows (R. 1):

> "* * * (Describing the minerals including oil and gas) *shall be subject to disposition in the form and manner* provided by this act * * *." (Italics ours.)

By Section 1, deposits of oil and gas on the public domain, *shall* be subject to disposition in the form and manner provided by this Act to citizens of the United States. The lands *shall* be disposed of, a very mandatory expression, and there is no discretion left as to whether or not the Secretary desires to dispose of these lands, but it imposes on him a positive duty to dispose of them as provided in the Act.

Section 13 of the Act is as follows (R. 2, 10):

> "That the Secretary of the Interior is hereby *authorized,* under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit".

It appears that the interpretation of Section 13, whether it is permissive or mandatory, hinges on the word "authorized". In interpreting Section 13 the entire act must be read in order to ascertain whether Congress intended the word "authorized" to mean merely permissive or mandatory upon the Secretary to issue prospecting permits.

Section 32 of the Act is as follows (R. 6):

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and *to do any and all things necessary to carry out and accomplish the purposes of this Act.*" etc. (Italics ours.)

It will be noted that the same word "authorized" which is used in Section 13 is also used in Section 32. If the word "authorized" is permissive and not mandatory in Section 13, then it is fair to assume that "authorized" in Section 32 is also permissive and not mandatory. Is it reasonable to suppose in construing Section 32, that Congress intended that the Secretary of the Interior may or may not prescribe the necessary rules and regulations, to do any and all things necessary to carry out and accomplish the purposes of this Act? Is it reasonable to assume that if the Secretary did not desire to prescribe any regulations to carry out the Act, he need not prescribe such regulations because the word "authorized" is interpreted by him to mean merely permissive and not mandatory? Is it reasonable to construe the word "authorized" as used in Section 32 as merely permissive and that in the place of the Secretary drawing up regulations in order to accomplish the purposes of the Act he may not do so because the word

"authorized" as used in Section 32 is permissive and not mandatory? This is preposterous on the face of it. Therefore, it is fair to conclude that the word "authorized" as used in Section 32 is mandatory and not permissive. In other words, that the Secretary *must* prescribe the necessary rules and regulations in order to carry out the purposes of the Act, and if the word "authorized" in Section 32 is mandatory, by no stretch of the imagination can we construe the word "authorized" in Section 13 to be permissive.

Considering the title of the Act which says its purpose is to "promote" the mining of oil and gas, Section 1, which states that the lands *shall* be subject to disposition in the form and manner provided by this Act, Section 13 which authorizes the Secretary of the Interior to issue prospecting permits to qualified applicants, and Section 32 which authorizes the Secretary of the Interior to draw up the necessary rules and regulations in order to carry out the purposes of the Act as stated in its title and in its enacting clause, the inevitable conclusion is that the word "authorized" is mandatory and not permissive. When we say the word "authorized" is mandatory and not permissive, we do not mean that the Secretary is bound to issue a permit on every application that may be filed. The Act does give the Secretary discretion in the administration of the public lands. But the discretion given to him is a legal discretion and not an arbitrary one. It is true that the Secretary must ascertain the qualifications of the applicant. These qualifications are set out in the Act. The applicant must be a citizen of the United States or an association of such persons, or a corporation organized under the laws of the United States or of any State

or Territory thereof, or a municipality. What are the further qualifications? The lands must not be in a producing structure of an oil or gas field. In ascertaining these qualifications, both as to persons and to the lands, the Secretary exercises a legal discretion, but when this discretion is exercised and he finds that the lands are not within a producing structure and that the applicant is qualified under the Act to receive a permit, his discretion ceases and a permit must issue on such application to carry out the purposes of the Act and the intent of Congress in passing it. We find, therefore, from a study of all the pertinent clauses and sections of the Oil Leasing Act relating to these cases, that the Secretary of the Interior is compelled by law to issue permits to qualified applicants for lands not within a producing structure, and that the word "authorized" as used in Section 13 of the Act, is for all intents and purposes, mandatory and not permissive.

CIRCULAR NO. 672.

Circular No. 672 is the Secretary of the Interior's regulation under the Oil Leasing Act, and the promulgation of which was authorized by Section 32 of the Act.

This circular contains among other instructions, the following paragraph:

> "It should be understood that under the Act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, *as the facts may be deemed to warrant.*"

For over nine years the Department of the Interior had issued permits on applications without ever interpreting this paragraph as now interpreted. For over nine years it has been understood, and by its own action in refusing certain applications, the Department itself has invoked this paragraph by citing *facts* which prompted such rejection, as failure to show evidence of citizenship or because the lands were in a producing structure, or because the applicant applied for more acreage than he was allowed by law. Not until the present Secretary of the Interior came into office has any other interpretation been given to this paragraph. Assuming, however, that the interpretation of this paragraph in circular No. 672 is a proper one, then Orders Nos. 337 and 338 are null and void because nowhere within the Act itself is the Secretary given the power to reject in whole or in part, an application for prospecting permit as he sees fit, and no regulation can amend or suspend an Act of Congress. His authority to draw up any regulation governing this Act is circumscribed by the language in Section 32, and it is inconceivable that Congress which spent nine years in considering legislation governing mining on the public domain before passing this Act, will permit anyone to destroy that legislation at will, which the Secretary has done by his Orders Nos. 337 and 338.

It is true, that he exercises a legal discretion as this paragraph in Circular No. 672 states, to reject in whole or in part an application for permit in individual cases "as the facts may be deemed to warrant". He is the official in whom authority is vested to determine whether or not an applicant for a permit is qualified under the law, and whether the lands

that such applicant seeks to acquire are available for appropriation under the law.

LAND DECISIONS.

Any number of land decisions maintain the position of petitioner, that the Secretary does not possess the discretion he claims and that these decisions recognize the *right*, not the *privilege* of an applicant who is qualified to a permit for lands which are not in a producing structure.

In 48 Land Decisions, 98, are Instructions by the Secretary of the Interior.

A number of applications for permits were filed on the very first day or shortly after the passage of the Act of February 25, 1920, in the State of Montana under Section 13 of the Oil Leasing Act. Because of the vast number of applications involved, it took considerable time for the Land Office to consider these applications. When they finally were considered by the Land Office, it was found that the lands embraced in those applications were, since the filing of same, classified by the U. S. Geological Survey as being in what is known as the Cat Creek producing structure. Accordingly, these applications were held for rejection because the lands were in a producing structure, and on appeal to the Secretary of the Interior, the rejection of these applications was sustained. On a Motion for Rehearing, however, the Secretary reviewed these decisions and in his instructions to the General Land Office stated as follows:

> • • • "Applying the principle so announced, it is clear that not only equitably but legally, qualified persons who filed proper applications for oil

or gas prospecting permits under the Act of February 25, 1920, *can and should not be deprived of their rights, if*, because of delay in action upon the application so filed, there intervenes a designation by this Department of the lands as being within the geological structure of a producing oil or gas field occasioned by a discovery of oil or gas subsequent to the filing of the application in the local land office."

This is a typical case which brings out four important points: First, that the Secretary of the Interior recognized the right to a permit by a qualified applicant upon the filing of an application; Second, that such right is initiated at the time the application was filed and not at the time the application is considered by the General Land Office; Third, that this right is not affected by changes in the status of lands between the time the application was filed and the time that it may be considered by the General Land Office; Fourth, this decision clearly shows, coming as it does from the Secretary of the Interior, the kind of discretion granted him under Section 13 of the Oil Leasing Act, a discretion which he properly and judiciously used in the above case. We see, therefore, by this decision, that the Department of the Interior has steadfastly recognized the right to a permit by a qualified applicant, and that the discretion given him by the Leasing Act refers only in so far as the qualifications of the applicant are concerned, and the nature of the lands involved.

WEST V. ALLING.

The case of West v. Alling, 30 Fed. (2d) 739, is the leading case on the questions involved. The District Court of Appeals said:

> "It will be observed that the Act in Section 1 expressly provides for the disposition of oil and gas land through prospecting permits and subsequent leasing 'to citizens of the United States'; and the power vested in the Secretary to establish rules and regulations for the carrying out of the Act does not imply the power to establish a rule or regulation that will conflict with an expressed provision of the Act. It follows, we think, that if the applicant sufficiently qualifies as a citizen of the United States, the Secretary is powerless to refuse such applicant a permit or to make any rule or regulation that interferes with the right of such applicant."

It will be noted from the above language of the District Court of Appeals that the Secretary is powerless to establish any regulation which conflicts with the expressed provision of the Act and that he has no discretion to issue or not to issue a permit to a qualified applicant.

WHEN PERMISSIVE WORDS ARE MANDATORY.

It is well settled that even where permissive words are used, such as "may" in statutes conferring power upon public officers, without other language showing that it was intended to vest discretion, such words are to be construed as equivalent to "must" or "shall" where the statute imposes a public duty or makes provisions for the benefit of individuals whose rights can not be effectuated without the exercise of the power. See Minor v. Mechanics Bank, 1 Peters 47; Supervisors v. United States, 4 Wallace 435.

In Supervisors v. United States, *supra*, the language used in the Statute conferring authority to levy a tax to satisfy the indebtedness of the county was

"may if deemed advisable." Notwithstanding the accompanying language, i. e., "if deemed advisable", it was held that the statute gave the bank the right to demand that the supervisors should exercise their powers to make a satisfaction of the indebtedness, the Court saying:

> "The conclusions to be deduced from the authorities is, that where power is given to public officers in the language of the Act before us, or in equivalent language—whenever the public interests or individual rights call for its exercise—the language used, though permissive in form is in fact peremptory. What they are empowered to do for a third person the law requires be done."
> * * *
> "In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion but to impose a positive and absolute duty."

In Chase v. United States, 261 Fed. 833 (8 C. C. A.) affirmed (256 U. S. 1), an Act providing for allotments to the children of Omaha Tribe was in question. The Act stated:

> "That the Secretary of the Interior be and he is hereby *authorized* to cause to be surveyed * * * and after such survey and appraisement to sell and convey * * * all the unallotted Omaha Indian Reservation * * *."

In the language of the court (P. 837), it was held that a statute authorizing a public officer to do a thing imposed upon him a positive duty to do such thing which might be enforced by those for whose benefit it was to be done in the absence of words in the statute

giving him discretion. Reference is there made to the case of Mason v. Fearson, 9 How. 248, 258, 13 L. Ed. 130, and cases there cited.

From an interpretation of the Oil Leasing Act itself; from an interpretation of Circular No. 672 which embodies the regulations of the Interior Department of this Act; from the Land Decisions promulgated in the Interior Department and from Court decisions, the Oil Leasing Act, and particularly Section 13 does not give the Secretary of the Interior the right to reject permit applications without cause or on the strength of a policy adopted by him and contrary to a policy adopted by Congress. See Opinions of Justices Bailey and Siddons on the authority of the Secretary to suspend the Act of February 25, 1920 (R. 34, 37).

WITHDRAWALS UNDER THE ACT OF JUNE 25, 1910.

If the Secretary does not possess the power he claims from the Oil Leasing Act itself, does he derive that power from other sources? As stated in the outset, the question of withdrawal has no place in the consideration of this case; the question of withdrawal was not raised by respondent in his answer to the Petition in this case, but as the decision herein complained of is based on an alleged withdrawal, it is necessary to give it consideration.

In the first place, no proclamation or withdrawal of lands was issued by the President of the United States on March 12, 1929, or at any time since. The President did issue a statement through the press in which he stated, among other things that there will be complete conservation of Government oil in this administration. This may be interpreted in a num-

ber of different ways, but it certainly was not a legal withdrawal of lands for any purpose and it was not a proclamation bearing the signature of the President. If the President had issued a formal proclamation withdrawing *all* public lands from further filing for oil prospecting purposes, such action would not have been valid. The Constitution specifically provides that Congress is vested with the power to make rules respecting the public domain. However, this is irrelevant because no proclamation was ever issued withdrawing such lands. No proclamation having been issued, the Secretary is now relying on an alleged withdrawal under the Act of June 25, 1910, and as evidence of such withdrawals he submits a telegram of March 13, 1929, and Departmental Orders Nos. 337 and 338. This telegram was signed by Spry, then Commissioner of the General Land Office and approved by respondent. It reads as follows:—

> "No oil and gas prospecting permits will be issued on and after March Twelfth nineteen Twenty nine Stop Reject all applications for oil and gas permits now pending in your office and receive no more Stop All orders for drawings hereby revoked
>
> SPRY
> *Commissioner*
>
> Approved:
> RAY LYMAN WILBUR
> *Secretary.*"

It will be noted that this telegram is merely direction to the Register to reject all pending applications and refuse to receive any further applications for permits. It does not *describe* any particular lands and does not

cite any particular withdrawal. This telegram, therefore, in itself, could not be considered a withdrawal of lands. Now, if the telegram referred to is not a withdrawal, let us consider Orders Nos. 337 and 338 (R. 4, 20, Exhibit "A"). It is sufficient to state that they are, in substance directions to the Commissioner of the General Land Office and to the Registers of all local Land Offices to reject all applications then pending for oil and gas permits, and to refuse to receive any further applications. No withdrawal of lands made since the establishment of the Land Department was ever termed in the language of this telegram and these Orders. Surely if a withdrawal of lands was contemplated, there is no valid reason why these Orders should not have stated that the lands were withdrawn. The whole gist of these Orders shows clearly that the Secretary erroneously felt that he had authority to issue directions to his subordinate officers to suspend Section 13 of the Oil Leasing Act. The word "withdrawal" is not used in any of the three papers referred to, and neither are any words used from which we can infer a withdrawal of lands. In other words, these memoranda to the press which were later called Orders Nos. 337 and 338, were not withdrawals of public lands but was a withdrawal by the Secretary from his subordinates of their power to carry into effect a Statute enacted by Congress. Even an intimation of the possession of such authority by an administrative officer of the Government is unthinkable. Had certain described lands been withdrawn and had the lands here involved been included in such a withdrawal, then the effect of such withdrawal on the issuance of permits might form a subject of proper discussion, but a withdrawal which was never

made, certainly can not control a decision in this case.

That the Secretary did not rely on any withdrawal having been made in order to sustain his action, is obvious from the decisions and published statements of the Department itself. In the decision in the Vedder case, dated October 8, 1929, and identified in the Department as A-14137, the Secretary states:—

> "By decision of July 24, 1929, the Commissioner of the General Land Office sustained the action of the register of the district land office at Sacramento, California, in refusing to receive for filing an oil and gas prospecting permit application presented by Richard D. Vedder on the ground that by Departmental Order No. 338 of March 20, 1929, the Secretary of the Interior had instructed registers of local land Offices not to receive such applications after March 12, 1929.
>
> "Vedder has appealed, contending that the action was without authority of law. ..
>
> "The appellant neither shows or alleges any right or equity based on lawful or equitable expenditures made or work performed upon or for the land applied for.
>
> "Under the Leasing Act of February 25, 1920 (41 Stat. 437), and the regulations thereunder approved March 11, 1920, reprinted as amended October 29, 1920, the granting of permits or licenses to prospect for oil and gas upon the public lands is discretionary with the Secretary of the Interior.
>
> "This discretion has been exercised as to the appellant, without discrimination, for the general public interest and benefit."
>
> "The action heretofore taken will not be disturbed."

It will be seen from this decision that the reason he gives for the rejection of the application is not based on any withdrawal, but specifically states that under the Leasing Act and the regulations thereunder, the granting of a prospecting permit is discretionary with the Secretary of the Interior, and that this discretion has been exercised by him.

In another decision which was taken on appeal and identified in the Interior Department as A-14139, the Secretary in upholding the rejection of an application, stated: "The granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior." "This conforms to the language of the Statute, Section 13, which is permissive, not mandatory." Not a word is mentioned about withdrawals. In the same decision the Secretary very clearly states, "the present case involves only the Leasing Act of February 25, 1920."

Now by the established principle of construction that the intention of the parties creating a document such as a withdrawal, will govern the interpretation of the nature of that document, we find that by his own acts after the promulgation of Orders Nos. 337 and 338 which the Court of Appeals now claims are withdrawals, the Secretary thought otherwise of them in his decisions on pending cases in the Department, for he cites the authority for issuing orders Nos. 337 and 338 not a withdrawal of lands but the granting of discretion to him by the Act itself. He has even gone further than his decision in showing his intention not to interpret these orders as withdrawals. In the Land Service Bulletins which are published monthly by the direction of the Secretary of the Interior, we find that among other things published in

these Bulletins which are official, that prospecting permits have actually issued since the issuance of Orders Nos. 337 and 338. Now, if these orders can be interpreted as withdrawals, as now claimed by appellant, how could he issue permits to some, and deny a permit to petitioner? True, he claims these cases to be exceptions inasmuch as the issuance of these permits was based on equities established by the applicants because they had submitted a geological report of the lands embraced in such applications which he claims are of benefit to the Government. But withdrawals do not recognize any exceptions except valid subsisting rights at the time the withdrawal is made, and counsel for respondent claims that the filing of an application is not a valid subsisting right, and therefore, no matter what geological reports have been filed by those who are fortunate enough to be favored by the Secretary with the issuance of permits ever since these alleged withdrawals were made, they have no greater rights than petitioner, and the Secretary was wholly wrong in rejecting the application of petitioner or he was wholly wrong in issuing permits to others. If by these Orders the entire public domain which is believed to possess potential petroleum value, has been withdrawn, as must be the case if *any* of said lands have been so withdrawn, then none of said lands have been open to issuance of oil prospecting permits because withdrawn lands are not subject to acquisition. By the fact that the Department has issued such permits proves conclusively that its action denying a permit to petitioner was not based on a question of withdrawal but on the wrongful exercise of a discretion which the Secretary erroneously thought he possessed under the Oil Leas-

ing Act itself. Therefore, the inevitable conclusion is that no withdrawals exist of public lands as held by the District Court of Appeals and the case must stand or fall on the discretion granted to him under the Act itself.

Assuming that the telegram of March 13, 1929 and Orders Nos. 337 and 338 could possibly be interpreted as withdrawals, then we must consider whether or not they comply with the requirements of the withdrawal act of June 25, 1910.

The first section of this Act is as follows:—

> "That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry, any of the public lands of the United States including the District of Alaska, and reserve the same for water power sites, irrigation, classification of lands, or other public purposes, to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Section 2 is immaterial for these cases, but Section 3 further provides:—

> "That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of withdrawals."

A withdrawal, therefore, under the Act of June 25, 1910, must contain five elements.

1. It must be of a temporary nature.
2. The lands withdrawn must be from settlement, location, sale or entry.

3. The lands withdrawn must be for "water power sites, irrigation, classification of lands, or other public purposes."
4. The purpose for which the lands are withdrawn must be specified in the order of withdrawal.
5. Such withdrawals must be reported to Congress by the Secretary of the Interior, "at the beginning of its next regular session after the date of withdrawal."

Now these orders did not contain any one of these five elements, and therefore, if called withdrawals, they are void as they do not comply with the Act of June 25, 1910. They are not temporary in nature because the language used in Orders Nos. 337 and 338 could not be inferred as being of a temporary nature. The word "temporary" or any other words which we can infer as being of a temporary nature, are not used in the entire Orders Nos. 337 and 338 or in the telegram to the Registers of the local Land Offices. In fact the telegram says that no permits will issue after March 12, 1929. It does not use the words "until further notice." The orders Nos. 337 and 338 use similar language.

Second, these orders do not withdraw lands from settlement, location, sale or entry. When the word "settlement" is used it means a man settling on the lands for the purpose of acquiring a homestead. When the word "location" is used, it means the locating of lands for mineral purposes, for instance, and later acquiring patent under the old mining laws. When the word "sale" is used, it means that the lands are bought from the Government at so much per acre under the Isolated Tract laws, for instance. When the

word "entry" is used, it means a homestead entry under the various homestead laws or a mining entry under the old mining law. The issuance of permits does not contain any of these elements because settlement, location, sale or entry, suggests the parting of title by the Government to the lands settled, located, sold or entered, and in issuing a prospecting permit the Government not only constantly maintains title to the land but during the life of the permit and the life of the lease when issued, if a commercial discovery is made, it exercises a complete control of the operation of these lands and shares in the minerals mined. Fourth, the purpose is not stated in these withdrawals. The Act of June 25, 1910, contemplated a legal purpose and the creation of a policy by the Secretary of the Interior is not a legal purpose because the Constitution vested Congress with the power to create such policies by duly enacted legislation which it did in the passage of the Oil Leasing Act.

It does not comply with the fifth element because these Orders which are now submitted as withdrawals were not reported to Congress by the Secretary of the Interior at its next regular session.

Although the Court of Appeals in its decision holds that the acts of the Secretary of the Interior constituted a withdrawal of the public lands of the United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, the terms of the Act of June 25, 1910, have not been complied with in that no report of such withdrawal has been submitted to Congress.

The land applied for by petitioner is situated in the State of California. The report of the Secretary of the Interior to Congress for the year 1928 shows

that 1,178,392 acres of petroleum public lands were withdrawn under the Act of June 25, 1910, within the State of California. No additional withdrawals were reported in the years 1929 and 1930.

In other words, during 1929 when Orders Nos. 337 and 338 were promulgated which the Court of Appeals construes to be a withdrawal, no additional acres of petroleum public lands were included in the reports to Congress as withdrawn under the Act of June 25, 1910; the figures being the same for all three years. The same is true insofar as the States of Montana, Colorado and Utah are concerned. In Wyoming, the number of acres shown as withdrawn in the report for 1929 is some 4,000 acres less than in the report for 1928. No petroleum public lands were reported to have been withdrawn in New Mexico under the Act of June 25, 1910, according to the Secretary's report to Congress.

The above conclusively shows that the Secretary of the Interior did not construe his acts and Orders Nos. 337 and 338 as withdrawals under the Act of Congress of June 25, 1910.

These reports which do not include reference to the discontinuance of the granting of prospecting permits for oil and gas constitute a construction placed by the Department on the Act of June 25, 1910, which is persuasive upon the courts. These orders do not comply with any of the requirements under the withdrawal Act. See Opinion of Justice Bailey on the question as to whether the Orders Nos. 337 and 338 of the Secretary of the Interior constituted a withdrawal of the public lands from prospecting for oil and gas (R. 37).

MIDWEST CASE (236 U. S. 459).

It is claimed that if the Secretary did not possess the kind of discretion which he has exercised in these cases by virtue of the Oil Leasing Act, that the President's statement to the press, the telegram of March 13, 1929, to the local Land Offices and the Secretary's orders Nos. 337 and 338, are not withdrawals, under the withdrawal Act of June 25, 1910, then he has a right to consider them as withdrawals by virtue of the Midwest case.

Let us briefly consider the Midwest Case. In 1909, President Taft was urged by the then Secretary of the Interior to make withdrawals of two tracts of lands in Wyoming and California in order to prevent the alienation of these lands, which were considered as having potential petroleum value, from being located under the old placer mining laws. President Taft withdrew these lands but he doubted his legal right to do so and in a message to Congress recommended legislation giving the President authority to make such withdrawals and validating these withdrawals of 1909. Congress refused to validate these withdrawals but instead, passed the withdrawal Act of June 25, 1910, actually limiting and circumscribing the authority of the President to make withdrawals. The Midwest Co. entered upon lands embraced in the withdrawal of 1909 after the lands were withdrawn. When the case reached this Court it had the question before it merely as to the 1909 withdrawals made prior to the passage of the withdrawal Act of June 25, 1910. This Court held that these withdrawals were valid in the absence of legislation, that it established a law by acquiescence in the absence of a specific Statute. But since the withdrawals con-

sidered in the Midwest case were made, Congress had spoken by the passage of the Act of June 25, 1910, and limited the power of the President to make such withdrawals, something which Congress had not done in 1909 when the withdrawals referred to in the Midwest case were made; therefore, any withdrawals made after June 25, 1910, must conform to that Act.

In the very lands embraced in the 1909 withdrawals, permits under Section 13 of the Oil Leasing Act have been issued both in Wyoming and California and some of these permits have ripened into leases. When the Oil Leasing Act was passed the question arose as to whether or not the existence of these 1909 withdrawals in the States of Wyoming and California, interfered with the issuance of prospecting permits and if they did, as to whether or not the Secretary of the Interior should not recommend to the President the revocation of these withdrawals in order to give full operation of the Oil Leasing Act. When this question was then considered, it was decided by the Solicitor's office of the Interior Department that the existence of these withdrawals made by President Taft in 1909 and any other withdrawals made subsequent thereto, did not in any way interfere with the issuance of prospecting permits under the Oil Leasing Act because these withdrawals only affected such entries on public lands wherein the Government would part with the title to those lands, and did not affect prospecting permits wherein the Government constantly maintains the complete ownership and control of such lands. Permits have issued and have continued to issue to this very day on lands embraced in valid withdrawals. Therefore, even if these Orders are Oil withdrawals, they would not in-

terfere with the issuance of prospecting permits because withdrawn oil lands do not bar the issuance of prospecting permits and do not interfere with the full operation of the Oil Leasing Act.

Insofar as the question of withdrawals are concerned, first, no legal withdrawals were ever made by proclamation or otherwise; second, that if these so-called orders could possibly be interpreted as withdrawals, they are invalid because they do not comply with the withdrawal Act of June 25, 1910; Third, that the Midwest decision does not apply to these cases because the withdrawals referred to in that decision were made prior to the Act of June 25, 1910; and Fourth, admitting that these Orders are withdrawals under the Midwest decision, and for that matter under the Act of June 25, 1910, they do not affect the issuance of prospecting permits as withdrawals of any kind do not interfere with the full operation of the Oil Leasing Act. Therefore, the inevitable conclusion is that the decision of the trial court in granting a Writ of Mandamus on the Petition filed by petitioner is sound in law and should stand, and that the decision of the District Court of Appeals should be reversed.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that petitioner's application for oil and gas prospecting permit under the Act of February 25, 1920, may be considered on its merits and permit issued thereon according to law, and that to such an end a writ of certiorari

should be granted and this Court should review the decision of the Court of Appeals and finally reverse it.

LEWIS EDWIN HOFFMAN,
CHESTER I. LONG,
Counsel for Petitioner.

EXHIBIT "A."

ORDER No. 338.

UNITED STATES,
DEPARTMENT OF THE INTERIOR,
Washington, March 20, 1929.

The following outlines the general procedure in the Department of the Interior for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the Solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to determine whether permittees have acquired equities

which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights or question of similar character, they should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy, otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be

in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields were a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration.

13. Permits issued and outstanding in Executive Order Indian Reservations under the act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.

FILE COPY

Nos. 618, 676, 704, 743

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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1930

UNITED STATES OF AMERICA, EX REL., ETHEL M. McLENNAN, PETITIONER

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

UNITED STATES OF AMERICA, EX REL., H. H. SIMPSON, PETITIONER

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE

UNITED STATES OF AMERICA, EX REL., ROY G. BARTON, PETITIONER

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

UNITED STATES OF AMERICA, EX REL., W. P. PYRON, PETITIONER

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE RESPONDENTS

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 618

UNITED STATES OF AMERICA, EX REL. ETHEL M. McLENNAN, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

No. 676

UNITED STATES OF AMERICA, EX REL. H. H. SIMPSON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR and Charles C. Moore, Commissioner of the General Land Office

---

No. 704

UNITED STATES OF AMERICA, EX REL. ROY G. BARTON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

No. 743

UNITED STATES OF AMERICA, EX REL. W. P. PYRON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The general question presented in the above-entitled causes involves the determination of the extent of the authority of the Secretary of the Interior and the President of the United States, in aid of the administration's oil conservation policy, to withdraw the public lands of the United States from the operation of certain portions of the oil and gas provisions of the Leasing Act of 1920 (c. 85, 41 Stat. 437, U. S. C., Title 30, Secs. 181 *et seq.*). This question is of importance in the administration of the public lands.

Approximately two hundred similar cases are now pending in the Supreme Court of the District of Columbia. The Attorneys General of the States of Wyoming, Colorado, Montana, New Mexico, and Utah have notified us of their intention to apply for leave to file briefs in this Court as *amici curiae* in support of the petitions.

For these reasons the Government does not oppose the petitions.

THOMAS D. THACHER,
Solicitor General.
SETH W. RICHARDSON,
Assistant Attorney General.
AUBREY LAWRENCE,
Special Assistant to the Attorney General.
PAUL D. MILLER,
Attorney.

FEBRUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

Nos. 618, 676, 704, 743

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CHARLES ELMORE CROP
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In the Supreme Court of the United States,

OCTOBER TERM, 1930

UNITED STATES OF AMERICA EX REL. ETHEL M. McLENNAN, PETITIONER,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, PETITIONER

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RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE

UNITED STATES OF AMERICA EX REL. ROY G. BARTON, PETITIONER

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RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 618

UNITED STATES OF AMERICA EX REL. ETHEL M. McLennan, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

No. 676

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office

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No. 704

UNITED STATES OF AMERICA EX REL. ROY G. BARTON, petitioner

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RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

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UNITED STATES OF AMERICA EX REL. W. B. PYRON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office

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ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum opinions of the Supreme Court of the District of Columbia are not reported. They may be found in the respective records as follows: in No. 676 (Simpson) at page 21; in No. 704 (Barton) at pages 20–22; in No. 743 (Pyron) at pages 25–27. The opinion in No. 743 also applies to No. 618 (McLennan). The opinion of the Court of Appeals of the District of Columbia in No. 704 (R. 25–39) is reported in 46 F. (2d) 217. The memorandum opinion of the Court of Appeals in Nos. 618 (R. 17, 18) 676 (R. 27, 28), and 743 (R. 35, 36) is reported in 46 F. (2d) 224.

JURISDICTION

The judgments of the Court of Appeals sought to be reviewed were entered December 1, 1930. (No. 618, R. 18–19; No. 676, R. 28–29; No. 704, R. 39;

No. 743, R. 42.) Petitions for certiorari in all four cases were granted by this Court on March 2, 1931. (No. 618, R. 40; No. 676, R. 44; No. 704, R. 41; No. 743, R. 53.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioners filed or sought to file applications for permits to prospect for oil on lands owned by the United States, under Section 13 of the Act of February 25, 1920 (41 Stat. 437). The Secretary of the Interior rejected or refused to receive these applications in pursuance of a policy initiated by the President to conserve Government oil completely in this administration, and this practice has been consistently adhered to by the Secretary. These cases present the question whether the Secretary should be compelled by writs of mandamus to reinstate or receive these applications "and to proceed therewith according to law."

STATUTES, REGULATIONS, AND DEPARTMENTAL ORDERS INVOLVED

These are set forth in Appendix A, pp. 45–55, *infra*.

STATEMENT

The petitioners filed petitions in the Supreme Court of the District of Columbia for writs of mandamus to compel the Secretary of the Interior [1]

[1] In Nos. 676 and 743 the Commissioner of the General Land Office was also made a party defendant.

(1) to receive, or to reinstate, the applications of the petitioners for permits to prospect for oil and gas upon specified portions of the public domain in California and New Mexico, under the Leasing Act of February 25, 1920, pp. 45–49, *infra,* and (2) to compel the Secretary to issue such permits to the petitioners. (No. 618, R. 1–9; No. 676, R. 1–13; No. 704, R. 1–15; No. 743, R. 1–17.) Rules to show cause were issued and answers to the petitions were filed by the Secretary. (No. 618, R. 9–12; No. 676, R. 13–20; No. 704, R. 15–19; No. 743, R. 17–25.) After hearings upon the pleadings,[2] the Supreme Court of the District entered an order in each case directing that a writ of mandamus issue commanding the Secretary to accept for filing (or to reinstate) the application or applications of the petitioner and to "proceed therewith according to law." The court did not order the Secretary to *issue* the permits and the petitioners did not appeal from the judgments. (No. 618, R. 12; No. 676, R. 22; No. 704, R. 22; No. 743, R. 28.) Upon appeal of the respondents, the Court of Appeals of the District of Columbia reversed the judgments of the Supreme Court of the District. (No. 618, R. 18; No. 676, R. 27–28; No. 704, R. 39; No. 743, R. 50.)

The petition filed in the Supreme Court of the District in No. 618, the *McLennan case,* alleges

[2] In No. 676 the petitioner filed a demurrer to the answer (R. 21), and the hearing was upon the petition, answer, and demurrer (R. 22). In No. 743 the hearing was upon the petition and answer, upon oral evidence introduced by the petitioner, and a written waiver of trial by jury. (R. 28.)

in substance: That the petitioner is a citizen of the United States and a resident of California (R. 1); that on October 29, 1928, pursuant to the Act of February 25, 1920, she filed with the Register of the Land Office at Sacramento, California, an application for a permit to prospect for oil and gas upon a certain designated portion of the United States public domain in California; that this application was in proper form and complied with all the requirements of the law and regulations of the Interior Department with respect to such applications (R. 2–3); that on the same day another and conflicting application for a permit was filed by another applicant with respect to the same land, whereupon a drawing was held on October 29, 1928, by the register of the local land office, pursuant to regulations of the Department of the Interior, in which drawing the name of the petitioner was the one first drawn; that under date of November 7, 1928, the Commissioner of the General Land Office at Washington was so advised (R. 3); that on March 13, 1929, the following telegram, signed by the Commissioner of the General Land Office, and approved by the Secretary of the Interior, was sent to the various United States land offices:

> No oil and gas prospecting permits will be issued on or after March twelfth, nineteen twenty-nine. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked.

That petition also avers that on the same day the Department of the Interior released a memorandum for the press which stated that the Secretary of the Interior and the Commissioner had sent instructions to all local land officers to the effect that they were not to receive applications for permits to prospect for oil and gas on the public domain and were to reject all pending applications, and further stating that these instructions were "in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration' " (R. 3–4); that on March 26, 1929, the petitioner was notified by the General Land Office that, pursuant to the instructions of the Secretary of the Interior of March 13, 1929, and in accordance with departmental order No. 337, of March 16, 1929, her application was rejected; that the petitioner is duly qualified under the law to receive the permit for which she applied, and has at all times been ready, able, and willing to comply with all lawful regulations of the Secretary of the Interior with respect thereto; that the issuance of such permit under the statute to a qualified applicant is purely a ministerial duty imposed by law upon the Secretary; that the action of the Secretary in denying the permit to the petitioner was arbitrary, confiscatory, and illegal (R. 6). Various sections of the Leasing Act of February 25, 1920,

are set forth in the petition, together with parts of the press memoranda and departmental orders therein referred to. (R. 6–7.)

The answer of the Secretary of the Interior admits substantially all the allegations of fact in the petition, but denies the allegations of law. (No. 618, R. 9–11.) It asserts authority to reject the application and alleges that under the Act of February 25, 1920, discretion was reposed in the Secretary "either to issue or decline to issue prospecting permits." (R. 618, R. 9–11.)

The petitions and answers in the other three cases are similar in substance. In Nos. 676 (Simpson) and 743 (Pyron) the applications for prospecting permits were filed subsequent to the executive and departmental orders and notices of March, 1929. (No. 676, R. 2, 5, 6; No. 743, R. 6.) The petition in No. 704 (Barton) contained an allegation that upon the filing of his application the petitioner acquired a vested right to the permit sought, and that the denial of the application by the Secretary was a taking of the petitioner's property without due process of law. (R. 10–11.) The answer of the Secretary and the Commissioner in No. 676 (Simpson) contained an additional allegation that the effect of the departmental and executive orders and notices of March, 1929, was to cause all public lands containing oil to be temporarily withdrawn from exploration for oil and gas under the Act of February 25, 1920. (R. 17.)

The action of the Supreme Court of the District of Columbia in directing the issuing of the writs of mandamus was based upon the assumption that the discretion vested in the Secretary of the Interior under Section 13 of the Leasing Act was a "judicial" discretion and not an "absolute" discretion, and the Secretary was not empowered by the statute to refuse to grant any permits at all and thus suspend the operation of the statute. The Supreme Court of the District also held that the action of the Secretary in March, 1929, did not amount to a withdrawal of the public domain from the operation of the Leasing Act under the Withdrawal Act of 1910 (pp. 49–50, *infra*). (No. 704, R. 20–22; No. 743, R. 25–27.) The Court of Appeals of the District of Columbia, with Mr. Justice Van Orsdel dissenting, reversed the judgments of the Supreme Court of the District on the ground that the action of the President and the Secretary of the Interior in March, 1929, amounted to a withdrawal of the public domain from exploration for oil and gas under the Leasing Act; that the rights of applicants for permits to prospect for oil and gas were subject to the executive authority to withdraw the land; that under these circumstances the rejection of the applications of the petitioners or the refusal to receive the same was a valid exercise of that power. (No. 618, R. 19–32; No. 676, R. 29–42; No. 704, R. 25–39; No. 743, R. 36–50.)

SUMMARY OF ARGUMENT

I

The Leasing Act of 1920 should be construed to give the Secretary of the Interior the power to decline to issue any permits to prospect for oil on public land whenever, in the exercise of reasonable discretion, it appears to him that it is in the public interest to issue no such permits.

A citizen has no vested right to enter upon the public lands to prospect for oil. The United States, as the owner of these lands and as sovereign over the property belonging to it, has the complete right to limit the use of these lands as it may desire, and since March 3, 1849, it has charged the Secretary of the Interior with supervision of the public lands. He should be regarded as having the power which an agent of a proprietor of real estate ordinarily has in regard to its management, unless some specific provision commands him to act in a certain way.

The Act of 1920 does not specifically direct the Secretary to issue permits to prospect for oil. It provides that oil lands "shall be subject to disposition in the form and manner provided by this Act" and merely authorizes the Secretary to grant prospecting permits under certain circumstances. The word "authorize" is not ordinarily mandatory. That it was not used in the phrase in question as mandatory is indicated by comparison of that phrase with certain other provisions of the Act which are clearly mandatory.

If the construction of the Act for which we contend is correct, the Secretary can not be compelled by mandamus to issue permits to the petitioners. It is elementary that the courts will not require such an executive officer to disaffirm a decision which he has made in the exercise of his judgment. There is no showing here that the Secretary acted arbitrarily.

II

Even if the Act of 1920 should be construed to direct the Secretary of the Interior to issue such permits, his duty to do so was terminated by the withdrawal of the lands in question by the President.

Within a few days after his inauguration in 1929, the President issued a statement that there would be a complete conservation of Government oil in his administration, and in pursuance of this policy the Secretary of the Interior immediately notified land offices that no prospecting permits should be issued. The rejections of the applications were made in pursuance of this policy and have been acquiesced in by the President and by Congress.

Prior to the passage of the Withdrawal Act of June 25, 1910, it was held that the President might, even in the absence of statutory authority, temporarily for public purposes withdraw public lands of the United States from the operation of an Act of Congress. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. As the Act of 1910 did not expressly abrogate the power which existed previous to that

time, such power would seem to be still existent, and the withdrawal in question would seem to be justified under the power which the President had in the absence of statute.

Anyway, authority to make such a withdrawal is expressly reposed in the President by the Withdrawal Act of June 25, 1910. The fact that the President did not make a formal proclamation would seem not to be fatal, as it has been held that it is sufficient if the action of the President "has such publicity as accomplishes the end to be attained." The fact that it does not appear, except inferentially, that the President acted directly is immaterial, as the act of a Cabinet officer is presumed to be done at the direction of the President.

The petitioners object that the withdrawal was invalid because it was not "for a temporary purpose," and that it was not "for a public purpose," as required by the Act; that the Act permitting withdrawal from "settlement, location, sale, or *entry*" does not apply to permits to prospect for oil, and also because no report of the withdrawal was made to Congress. We submit that none of these objections is fatal.

If the action of the President and the Secretary constituted a withdrawal, the mere filing of an application for a permit prior to the withdrawal, and *a fortiori* the filing of an application for a permit subsequent thereto, can not defeat the purpose of the withdrawal, as it can not create any vested right against the United States.

The action of the President and the Secretary of the Interior was intended to meet an emergency caused by a great overproduction of oil and gas and the waste incident thereto. The President was in a position to know when the public interests required the lands to be withdrawn. In view of these facts, the rejection of applications by the Secretary ought not to be regarded as unlawful merely because of the failure to meet any technical requirements in the statute or because the President or Secretary mistook the source of their authority. A writ of mandamus ought not to be issued to compel the performance of an act which will work public mischief.

The briefs filed in support of numerous States require no answer, inasmuch as the rights of the States to royalties do not accrue until something is earned and received by the United States.

ARGUMENT

I

THE LEASING ACT OF 1920 SHOULD BE CONSTRUED TO GIVE THE SECRETARY OF THE INTERIOR THE POWER TO DECLINE TO ISSUE ANY PERMITS TO PROSPECT FOR OIL ON PUBLIC LANDS WHENEVER IN THE EXERCISE OF REASONABLE DISCRETION IT APPEARS TO HIM THAT IT IS IN THE PUBLIC INTEREST TO ISSUE NO SUCH PERMITS

In order to understand the force and effect of the Leasing Act of 1920, it is desirable to consider previous legislation.

The General Mining Laws passed in 1872, and embodied in Sections 2319 *et seq.* of the Revised Statutes, declared all valuable mineral deposits in lands of the United States free to exploration and purchase, and the lands in which they were found free to occupation and purchase by citizens. They provided the form and method of location. They stipulated that no location should be made before the discovery of minerals within the limits of the claim involved. No other authority was required to permit a citizen to go upon the public domain, explore for and find minerals, locate his claim or claims, extract the minerals therefrom, or sell or dispose of the property. By going upon the public property when he chose, staking his claim, and taking other formal steps he acquired the property. As this Court said in *Wilbur* v. *Krushnic*, 280 U. S. 306, 314:

> The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease.

The Act of February 25, 1920, c. 85, 41 Stat. 437 (pp. 45–49, *infra*), which is entitled "An Act To promote the mining of coal, phosphate, oil, oil shale, or gas, and sodium on the public domain," provides:

> That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States [with certain exclusions not here material]

> shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation [with certain provisos].

Then follow 37 other sections. Separate provisions are made in respect of different kinds of deposits. Sections 13 to 20 relate solely to oil and gas. Section 13 provides that the Secretary of the Interior

> is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * *.

Then follow certain conditions which the permittee is required to observe and a provision that the

> applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; * * *

This section further provides that if the applicant shall erect certain monuments and notices at or near the monuments,

> he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified.

Then follow provisions requiring the marking of the corners of the tract described in the permit, after receiving the permit, and certain provisos.

Section 14 provides:

> That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit,

with certain provisos and additional provisions. The section further stipulates that—

> Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre * * *.

Section 15 provides that until the permittee shall apply for a lease he shall pay to the United States 20 per centum of the gross value of all oil or gas secured by him from the lands embraced within his permit and sold or otherwise disposed of or held by him for sale or other disposition.

Other sections provide for restrictions on drilling, forfeiture for violations of the permit or lease, leases of unappropriated deposits, and other matters.

The petitioners construe the Act of February 25, 1920, as requiring the Secretary under all circumstances and at all times to issue permits to proper persons to prospect for oil and gas on the pub-

lic domain. This construction evidently was adopted by the Supreme Court of the District in the instant cases. See also *West* v. *United States ex rel. Alling,* 58 App. D. C. 329, 30 F. (2d) 739. We maintain, however, that the Act should not be construed so narrowly, but that it must be construed as reposing in the Secretary the right to refuse to issue any permits whenever in the reasonable exercise of discretion he deems it for the public interest to issue no permits.

Apart from this Act, a citizen has, of course, no vested right to enter upon the public lands to prospect for oil. The United States, as the owner of these lands and as sovereign over the property belonging to it, has the complete right to limit the use of the lands in such manner as it may desire. *United States* v. *Grimaud,* 220 U. S. 506; *Light* v. *United States,* 220 U. S. 523; *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126; *Camfield* v. *United States,* 167 U. S. 518, 524; *Knight* v. *Association,* 142 U. S. 161; *Williams* v. *United States,* 138 U. S. 514, 524. Since March 3, 1849, the Secretary of the Interior has been charged by statute with supervision of the public lands. Section 441, R. S.

The authorities cited indicate that discretionary powers granted to the Secretary of the Interior "as guardian of the people of the United States over the public lands" are not to be so narrowly construed as are similar grants to ministerial officers or representatives. Unless the Leasing

Act of February 25, 1920, specifically requires him to issue permits even against his best judgment of what the public interest requires, it would seem that the Secretary should be regarded as having the power which an agent of a proprietor of real estate ordinarily has in regard to its management and that he should have the power to conserve the property of the Government.[3] The Act of 1920 does not specifically direct the Secretary to issue permits to prospect for oil. Although its general policy is to promote the mining of oil on the public domain, it provides that oil lands "shall be subject to disposition *in the form and manner provided by this Act,*" and Section 13 of the Act merely *authorizes* the Secretary to grant prospecting permits under certain circumstances. The usual meaning of the word "authorize" is "to confer authority upon; empower; commission",[4] and

[3] It is a matter of common knowledge that long prior to the enactment of the Oil Leasing Act predictions had been made that the oil supply of the United States would become exhausted to the detriment of the national defense and of the common welfare. Three naval reserves had been created by Executive order to conserve, if possible, a supply of oil in the ground for the future needs of the United States Navy. Laws had been passed by numerous States to prevent the waste of oil and gas in mining operations. There had been in the United States periods of overproduction of oil. Congress must have known these facts.

[4] See New Standard Dictionary; *County of Lehigh* v. *Hoffort*, 116 Pa. St. 119; *Pittman* v. *Road Improvement District*, 147 Ark. 87; *Klinck* v. *Pounds*, 163 N. Y. Supp. 1009.

Congress ordinarily uses the word "authorize" in this permissive sense.[5]

An examination of the rest of the Act indicates that the word "authorize" is used in the permissive sense. Thus Section 2, relating to coal lands, provides:

> That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant *shall*, divide any of the coal lands * * *. (Italics ours.)

In Section 17, dealing with proven oil and gas lands not covered by prior claims or right, it is provided that such lands "may be leased" by the Secretary. In Section 18a, dealing with public lands containing oil or gas covered by claims, the validity of which were being questioned either in

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[5] For example, it is the practice to *authorize* appropriations to be made. Such acts do not make the appropriation, nor do they impose the duty of subsequently making the appropriation. They are mere authorizations to be carried out later by specific appropriations if Congress deems the same advisable. See Act of May 16, 1928, c. 583, 45 Stat. 590; Act of April 28, 1924, c. 134, 43 Stat. 111. The word "authorize" in Acts relating to corporations, private individuals, and municipalities is often used in a permissive sense; for example, in the Act of May 25, 1920, c. 197, 41 Stat. 621, whereby certain railroad companies are *authorized* to convey lands, and the Act of August 7, 1919, c. 35, 41 Stat. 275, where a county is *authorized* to construct a bridge. On the other hand, where Congress desires to make a mandatory direction, it is common practice to use the words "authorized and directed." See Act of October 30, 1918, c. 198, 40 Stat. 1018; Act of March 4, 1921, c. 155, 41 Stat. 1364; Act of August 25, 1919, c. 52, 41 Stat. 281; and Act of May 16, 1928, c. 585, 45 Stat. 590.

the Department or in the courts, the President is "authorized" to direct the compromise and settlement of such controversies. On the other hand, in dealing with those oil and gas lands where legal rights or equities arising from substantial expenditures had arisen under the general mining or other laws prior to the passage of the Leasing Act, Congress used mandatory language. In Section 18, which dealt with claims initiated under the General Mining Laws prior to certain dates and where claimants had, through expenditure of time and money, brought in producing oil wells, Congress provides that upon an appropriate showing and a surrender of the mining title the locator or his successors in interest "shall be entitled to a lease." In Section 19, dealing also with mining locations upon which money had been expended and labor performed, it is provided that the claimants "shall be entitled to prospecting permits thereon upon the same terms and conditions and limitations as to acreage as other permits provided for in this Act." In Section 22, dealing with prior existing mining claims in Alaska, where substantial improvements had been made, it was provided that upon surrender of the mining claims the claimants "shall be entitled" to a lease or leases. Also in Section 14 of the Act, which deals with the reward to the prospector who, after having been granted a prospecting permit by the Secretary of the Interior, lawfully goes upon the land, expends

his time and money, and proves to the satisfaction of the Secretary of the Interior that he has discovered valuable deposits of oil or gas, it is provided that he "shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit." So, it appears that Congress commanded the issuance of leases to persons on the public domain who had prior rights and equities; but, as to persons who had no such rights or equities and who came in after the passage of the Leasing Act to seek the privilege of exploring the public domain, Congress vested in the Secretary of the Interior a discretion to grant or to refuse to grant such a license.

Section 30 of the Leasing Act provides that each lease "shall contain provisions * * * for the protection of the interests of the United States * * * for the safeguarding of the public welfare," and "to insure the sale of production of such leased lands to the United States and to the public at reasonable prices." (See Section 2, Clauses (d) and (h), and Section 3, Clause (d), approved form of lease as provided by G. L. O. Circular 672, par. 17.) These provisions have been construed to permit the exercise of discretion by the Secretary of the Interior, after the discovery of oil and during its production, to supervise the fixing of the selling price and partially or entirely to cut off further production under jus-

tification. See *Wilbur* v. *Texas Co.*, 40 F. (2d) 787 (Ct. App. D. C.), construing this Act.

The language used with reference to sodium in Section 23 is in marked contrast to that relating to oil lands in Section 13. Section 23 provides:

> That the Secretary of the Interior is hereby *authorized and directed*, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, etc. (Italics ours.)

If Congress had intended to invest every applicant with the right to require the issuance of a permit, it would seem that the same word, "directed," would have been used with reference to oil and gas.

The opinion of the Supreme Court of the District states (No. 618, R. 36):

> That the use of the words "is authorized" above does not necessarily vest him with such discretion as is claimed by him, is shown by the use of the same expression in section 32 of the act of 1920, where it is clearly mandatory.

We submit, however, that this section, which relates to the making of rules and regulations, throws no light upon the question.

The precise question in the instant cases seems never to have arisen in practice under the Act

of 1920 until the action complained of in the instant cases. But some indication that the Act was construed from the outset by the Secretary of the Interior in accordance with our contentions here is found in the second paragraph of the rules and regulations issued on March 11, 1920, under the Act, which reads:

> It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant.

It is contended that the Secretary's announcement in advance that no permits would be granted was an arbitrary refusal to exercise his discretion. The fallacy in this contention lies in the failure to recognize that the statute can not be construed as grantinng a discretion merely to consider the individual qualifications of applicants for permits, or as imposing a duty to grant permits to all suitable persons who may wish to prospect for oil upon the public land and to obtain a vested interest therein. If the statute be given an interpretation adequate to the accomplishment of its purpose to protect and conserve the natural resources of the United States, the Secretary was required, in the exercise of his discretion, to look beyond individual qualifications to the public interest and to consider

primarily the conservation and economic development of such resources. If, as we contend, the Secretary's discretion extended so far, then it was his duty to consider the facts stated by the President and such other facts as might properly influence his judgment, to determine whether prospecting permits could be issued without exhaustion and waste of oil deposits upon the public land, and, under proper circumstances, to refuse to issue any permits for the further exploitation of these resources.

The controlling question is one of construction as to the breadth and scope of the discretion imposed in the Secretary. We submit that a reasonable exercise of the Secretary's discretion includes more than a mere consideration of individual applications, and involves the public duty of refusing permits in order to prevent exhaustion and waste of natural resources. If we are right in this contention, the Secretary's action in this case was the fulfilment of a plain duty imposed by the statute.

The orders of the Secretary here complained of were made in March, 1929. During two regular sessions and one special session, Congress has acquiesced in the action of the Secretary. While this period of acquiescence is comparatively short, the scope and effect of the Secretary's action was so extensive that it can not have passed unnoticed. The presence of five States at the Bar of this Court in support of the petition for certiorari, because of

the importance to them of the orders of the Secretary, indicates that his action was of sufficient importance not to have been overlooked by the representatives of these and other States in the House of Representatives and in the Senate of the United States. Such tacit acquiescence, in a matter of such grave importance, must, we submit, be taken in recognition of the validity of the Secretary's orders.

II

THE ACTION OF THE PRESIDENT AND THE SECRETARY OF THE INTERIOR IN MARCH, 1929, AMOUNTED TO A WITHDRAWAL OF THE PUBLIC DOMAIN FROM THE OPERATION OF THE OIL AND GAS PROVISIONS OF THE LEASING ACT OF 1920, AND THE SECRETARY WAS THEREFORE WARRANTED IN REJECTING AND REFUSING TO CONSIDER THE PETITIONERS' APPLICATIONS FOR PROSPECTING PERMITS

Even if the Leasing Act of 1920 must be construed as containing mandatory directions to the Secretary of the Interior to issue permits to prospect on oil lands to qualified applicants, we contend that in 1929 he acquired the right to reject all permits by virtue of what amounted to a withdrawal by the President of the oil lands from the operation of the Leasing Act of 1920.

On March 12, 1929, in an informal statement to the press, the President of the United States said (No. 618, R. 4; No. 676, R. 17):

> there will be complete conservation of Government oil in this administration. * * *

On March 13, 1929, the following telegram was sent by the Secretary of the Interior to the various United States land offices (No. 618, R. 3; No. 704, R. 5):

> No oil and gas prospecting permits will be issued on and after March twelfth, nineteen twenty-nine. Stop. Reject all applications for oil and gas permits now pending in your office and receive no more. Stop. All orders for drawings hereby revoked.

On the same day the Department of the Interior released a memorandum for the press, which reads in part as follows (No. 618, R. 3–4; No. 704, R. 5–6):

> Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending.
>
> These instructions are in accordance with the statement issued at the White House yesterday to the effect that "there will be complete conservation of Government oil in this administration."

* * * * *

On March 16, 1929, a formal order, designated "Order No. 337" (Appendix A, pp. 51–52, *infra*), was issued by the Secretary of the Interior, reading

in part as follows (No. 618, R. 4, 5; No. 676, R. 17, 18–19; No. 704, R. 7–8, 12, 16; No. 743, R. 22–23):

> The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.
>
> There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.
>
> * * * * *
>
> No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.

This order was published generally in the public press. (No. 618, R. 4–5; No. 704, R. 7–9.)

On March 20, 1929, another formal order, known as "Order No. 338" (Appendix A, pp. 53–55, *infra*), was issued by the Secretary, reading in part as follows (No. 676, R. 3, 6, 7, 17, 18; No. 743, R. 6, 11, 21, 23–25):

> The following outlines the general procedure in the Department of the Interior

for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

* * * * *

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

* * * * *

It was pursuant to the foregoing orders and notices that the Secretary of the Interior rejected, or refused to receive, the petitioners' applications for permits to prospect for oil and gas under the Leasing Act. The Government contends, as held by the Court of Appeals, that the above-described action of the President and Secretary in March, 1929, amounted to a withdrawal of the public lands here involved from the operation of the oil and gas provisions of the Leasing Act and that by virtue thereof the Secretary was justified in rejecting or refusing to receive the petitioners' applications for prospecting permits. We maintain that the President had the power to withdraw the lands (1) entirely apart from any statutory authority, and

(2) by virtue of the express provisions of the Act of June 25, 1910.

(1) Prior to the passage of the Act of 1910 it had been held that the President might, in the absence of statutory authority, temporarily, for public purposes, withdraw public lands of the United States from the operation of an Act of Congress. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. In that case this Court said that the practice of withdrawal of public lands, both mineral and non-mineral, from private appropriation, by the President without special authority from Congress dates from an early period in the history of the country, and that the power as exercised had never been repudiated by Congress. We are aware of no case which has discussed the power of the President to make such withdrawals since the passage of the Act of 1910. That Act, however, nowhere expressly provides that the power which the President previously had should be abrogated or restricted. It is true that this Court in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 482–483, said:

> The majority [of the Senate committee], after a review of the practice of the Department, the acquiescence of Congress in the practice and the decisions of the courts, reported that the President already had a general power of withdrawal and recommended the passage of the pending bill *inasmuch as it operated to restrict the greater power* already possessed. Sen. Rep. 171 (61st Cong., 2d Session. * * * (Italics ours.)

But we submit that it is at least doubtful whether that part of the language of the Court which we have italicized, and which was unnecessary to the decision, is fully justified by the legislative reports. See extracts from the Reports of the Committee in question, which are appended in Appendix C, at pp. 57–58, *infra*.

(2) Anyway, authority to make such a withdrawal is expressly reposed in the President by the Act of June 25, 1910, pp. 49–50, *infra*, known as the Withdrawal Act. This Act provides:

> That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.
>
> * * * * *
>
> SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

By virtue of this statute it seems clear that the President is empowered, in aid of any proper "public purpose," to withdraw temporarily from exploration under the Act of February 25, 1920, all or any such portion of the public domain as in

his discretion may seem desirable. It is true that in the instant case no formal withdrawal proclamation was made by the President. But the statute does not provide any particular form or method to be followed in making a withdrawal and it would seem that any document or method which shows with clearness the executive intent to make a withdrawal and the purpose thereof would satisfy the statute. Here the object and purpose of the President and Secretary in issuing the order and notices in question were clear, and the obvious intention motivating these orders and announcements was to withdraw all public lands, except those specified, from the operation of the oil and gas provisions of the Leasing Act. Under these circumstances we submit that the withdrawal was effective even though no formal proclamation was issued. The decisions of this Court seem to sustain this conclusion.

Wilcox v. *Jackson*, 13 Pet. 498, involved the question whether a tract of land embracing the Fort Dearborn military post had been exempted from public preemption under the Act of 1830. That Act provided "that no entry or sale of any land shall be made" "which is reserved from sale * * * by order of the President, or which may have been appropriated, for any purpose whatsoever." The land in question had been set aside as a military reservation *by the Secretary of War* and had been so used from time to time. In hold-

ing that the land in question had been reserved from sale by "order of the President," this Court said (p. 512):

> Now, although the immediate agent, in requiring this reservation, was the secretary of war, yet we feel justified in presuming, that it was done by the approbation and direction by the president. The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the war department. Hence, we consider the act of the war department, in requiring this reservation to be made, as being in legal contemplation the act of the president; and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the president, within the terms of the act of Congress.

In *Wolsey* v. *Chapman*, 101 U. S. 755, the question was whether certain lands on the Des Moines River were subject to selection by the State of Iowa as forming part of a Federal grant, where previously the lands in question were withheld from sale by order of the Interior Department pending action by Congress with respect to various claims in connection with this land. The case involved Section 10 of the Act of September 4, 1841, providing that "no lands included in any reservation, by * * * proclamation of the President

* * * shall be liable to entry, etc." In that case this Court said (pp. 768, 770):

> The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley* v. *Wells*, was sufficient to defeat a settlement for the purpose of preemption while the order was in force, *notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.*
>
> * * * * *
>
> A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. *No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained.* If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we can not doubt that the lands would have

> been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox* v. *Jackson* that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act. (Italics ours.)

In *Wood* v. *Beach*, 156 U. S. 548, *Wolsey* v. *Chapman, supra,* was approved, and public lands withdrawn from entry and sale by the Interior Department in aid of certain railroad grants were held validly withdrawn.

In *Northern Pacific Railway Co.* v. *Wismer*, 246 U. S. 283, certain lands had been set aside for certain Indians under the direction of the Commissioner of Indian Affairs with a view to the establistment of a permanent reservation. The lands in question were held to have been validly withdrawn although no formal withdrawal order was issued by the Interior Department.

See also *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190; *Northern Pacific R. Co.* v. *Musser-Sauntry Co.*, 168 U. S. 604, 607.

The language used in the withdrawal statutes which were involved in the foregoing cases is similar to that used in the Withdrawal Act of 1910.

In view of the doctrine repeatedly enunciated by this Court that no particular form of proclamation by the President is required for a withdrawal and that it is sufficient if the action of the President "has such publicity as accomplishes the end to be obtained," we submit that the action of the President and Secretary of the Interior in March, 1929, in the instant case amounted to a withdrawal under the Act of 1910.

In the briefs of the petitioners in support of their petitions for certiorari, numerous objections are advanced against the foregoing contention. We submit that these objections are without merit.

It is contended that the Act of 1910 contemplated a withdrawal by the *President* and that in the instant case no formal order or proclamation was issued *by the President*. But the cases cited demonstrate that the act of the head of an executive department is the act of the President; that in all cases, save where the President is required to act judicially, the act of a Cabinet officer is presumed to be at the direction of the President. *Wilcox* v. *Jackson, supra,* 13 Pet. 498, 512; *Wood* v. *Beach, supra,* 156 U. S. 548, 550; *Wolsey* v. *Chapman, supra,* 101 U. S. 755, 769; *Jones* v. *United States,* 137 U. S. 202, 217; *United States* v. *Midwest Oil Co.,* 236 U. S. 459; *United States* v. *Morrison,* 240 U. S. 192, 212; *Chicago, etc. Ry.* v. *United States,* 244 U. S. 351, 357; *Maresca et al.* v. *United States,* 277 Fed. 727 (C. C. A. 2d) certiorari denied, 257 U. S. 657;

7 Ops. A. G. 453. The application of the rule of these cases to the instant case would seem to follow as a matter of course in view of the press notices issued by the President just prior to the issuance of the order of March 13, 1929, by the Secretary.

The petitioners further contend that under the Act of 1910 a withdrawal must be for a "temporary" purpose and that the present withdrawal was not a temporary one. But any withdrawal under the Act would seem to be "temporary," since the Act provides that it shall remain in force until revoked by the President or an Act of Congress. The statement of the Secretary to the press, issued simultaneously with his order of March 13, 1929, specifically stated that the order was pursuant to the statement issued on the previous day by the President that "there will be complete conservation of Government oil *in this administration.*" The policy of the administration is, of course, subject to change at any time. Moreover, it seems clear that the word "temporarily" was inserted in the Act only for the purpose of making it clear that the lands withdrawn would again be available for entry, sale, etc., when in the opinion of the President or Congress the purpose for which the lands were withdrawn had been accomplished. (See Cong. Rec., Vol. 45, 61st Cong., 2d Sess., p. 8170.)

The petitioners maintain that the instant case does not fall within the provision of the 1910 Act, which limits the reservation or withdrawal of pub-

lic lands "for water-power sites, irrigation, classification of lands, *or other public purposes.*" Since the acts of the Secretary and President were specifically in aid of the conservation of the Government's oil and gas resources and to meet a public emergency created by the overproduction of oil and gas, it seems patent that a "public purpose" is involved. Moreover, this contention of the petitioners is completely answered by the case of *United States* v. *Midwest Oil Co.*, 236 U. S. 459. That case involved a withdrawal of extensive areas of public land by President Taft for the purpose of assuring the conservation of a proper supply of petroleum for the Government's own use and pending the enactment of further legislation on the subject. This withdrawal was made prior to the passage of the Act of 1910, although the case was decided by the Supreme Court subsequent to its enactment. The Supreme Court held that the President possessed power to make the withdrawal.

It is further contended by the petitioners that the Act of 1910 applies only to a withdrawal of the public domain from "settlement, location, sale, or *entry*" and that an application for a permit to prospect for oil and gas under the Leasing Act does not fall within the language quoted. When the Act of 1910 was enacted there was nothing in existence precisely similar to a permit to prospect for oil and gas. But upon the general principal that the greater includes the lesser, it seems

clear that a withdrawal from "settlement, location, sale, or entry" would include a withdrawal from the operation of the oil and gas sections of the Leasing Act. Annually since 1920 there have been withdrawals of public lands from the operation of the Leasing Act based upon the Act of 1910. (See, for example, the Annual Report of the Secretary of the Interior, 1930, p. 55.)

Moreover, the legislative history of the Leasing Act negatives the contention of the petitioners. Representative Mondell of the Public Lands Committee, in explaining the Bill on the floor of the House, said, with respect to the words in question, "The words used include every method whereby public lands are acquired—location, settlement, filing, and entry—sale being a form of entry, entry by sale," and further, "it gives him [the President] the power to withdraw public lands from all forms of entry at any time." (Cong. Rec., Vol. 45, 61st Cong., 2d sess., pp. 5094, 8667, 8673.)

The petitioners assert that the acts in question do not constitute a withdrawal of public lands under the Act of 1910 because no report of such withdrawal was made to Congress as required under Section 3 of the 1910 Act, which provides "that the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (P. 29, *supra*.) We submit that the provision in the Withdrawal Act requiring a report

to Congress of withdrawals made by the President has no direct bearing on the question of what constitutes a withdrawal under the statute. The distinction between making a withdrawal and reporting the same to Congress is an obvious one. Since the statute requires a report only at the next regular session of Congress it is clear that a withdrawal order must often be in effect many months before any report thereof is required. The reporting of the withdrawal to Congress can not be regarded as an essential part of the withdrawal itself. The clear purpose of the provision in question is to inform Congress of the executive action. Here, in view of the numerous announcements to the press and the great general interest and publicity which the matter has aroused, it is inconceivable that Congress did not know about the action taken. It has been held that a direction in a statute to report certain executive action to Congress is only directory. *Buchanan* v. *United States,* 28 C. Cls. 127, 132.

If the action of the President and the Secretary in March, 1929, constituted a withdrawal of the public lands in question from the operation of the oil and gas provisions of the Leasing Act, then the mere filing prior thereto (and *a fortiori* the filing subsequent thereto) of an application for a permit to prospect for oil and gas may not defeat the effect or purpose of such withdrawal.

The prospecting permit provided for in Section 13 of the Leasing Act is in the nature of a license which, within the limits of the discretion contemplated by the statute, may be granted or denied by the executive authority. The permit may or may not ripen into a lease, but until the permit is granted no right in the property, legal or equitable, vests or exists in the applicant. It is well settled that mere applications to purchase public lands, or to enter upon the same, or undetermined claims to public lands, or any form of entry thereon which does not amount to a vested right, does not, as between the United States and the claimant, create any obstacle to the full exercise of ownership by the United States. *Frisbie* v. *Whitney,* 9 Wall. 187; the *Yosemite Valley Case,* 15 Wall. 77, 94; *Shepley* v. *Cowan,* 91 U. S. 330; *Campbell* v. *Wade,* 132 U. S. 34.

Under the law as it existed prior to the 1920 Act, this Court said in *Campbell* v. *Wade, supra* (p. 37):

> The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preemption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by

> occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held *that occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States,* which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. (Italics ours.)

Under the foregoing cases it is clear that the petitioners acquired no vested right in the public domain by the mere filing of applications for prospecting permits under the Leasing Act and, therefore, upon withdrawal of the public domain from the operation of the oil and gas provisions of that Act the Secretary was warranted in rejecting and refusing to consider the petitioners' applications.

As pointed out in the opinion of the Court of Appeals, the orders and notices of the President and Secretary of the Interior in March, 1929, were intended to meet an emergency "occasioned by the great overproduction of oil and gas, the waste incident thereto, and other public considerations." (No. 618, R. 27.) The situation is accurately described by the statement of this Court in the *Midwest case,* 236 U. S. 459, 471:

> The President was in a position to know when the public interest required particular

portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.

Although mandamus is a legal remedy, its issuance is largely determined and controlled by equitable principles. It is awarded in the exercise of a sound judicial discretion "to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law, but in disregard of its spirit." *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311–312; *Ex parte Skinner & Eddy Corp.* v. *United States,* 265 U. S. 86; *Work* v. *Rives,* 267 U. S. 175.

The States of Utah, New Mexico, Colorado, Wyoming, and Montana asked and received permission to file briefs in behalf of the petitioners. The claim is made by these States that under Section 35 of the Leasing Act (pp. 48–49, *infra*) the State is to receive 37½% of the royalties accruing to the Government from production of oil and gas on public lands within that State.

This gratuity depends on the contingency of discovery. There is not appropriated to these States any specific or definite sum, but the Act gives to the States 37½% of the amounts realized under oil and

gas leases, *if, as, and when received by the United States from such leases.* Consequently there is nothing due to the States until something is earned and received. That the donation is not based upon any *vested right* in the States is shown by the fact that in Section 35 of the Leasing Act all moneys accruing to the United States from oil and gas leases in the naval petroleum reserves are required to be deposited in the Treasury of the United States and retained by the United States.

The briefs in support of the contentions of the States upon their contingent claims add nothing to the argument and citations presented by the parties to the action, and therefore need no discussion here.

Assuming, as we contend, that the President possessed the power to withdraw public lands from the operation of the oil and gas provisions of the Leasing Act, the exercise of such power here involved should not be declared invalid because of informality, or even because the President and the Secretary may have mistaken the source of the power which they sought to exercise in the public interest. The acts of these executive officers, undertaken in the public welfare, involving considerations of enormous economic importance—tacitly approved, as they were, by the acquiescence of Congress—should not be set aside unless the existence of all power can be successfully denied.

We submit that the petitioners have not made out such a clear case of error upon the part of the President and Secretary as to warrant the arrest of the executive action by mandamus.

CONCLUSION

We respectfully submit that the judgments of the Court of Appeals should be affirmed.

THOMAS D. THACHER,
Solicitor General.
SETH W. RICHARDSON,
Assistant Attorney General.
CLAUDE R. BRANCH,
AUBREY LAWRENCE,
Special Assistants to the Attorney General.
PAUL D. MILLER,
Attorney.

APRIL, 1931.

APPENDIX A

STATUTES, REGULATIONS, AND DEPARTMENTAL ORDERS INVOLVED

The Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 441, 442, 443, 450, so far as it relates to oil and gas, provides, in part:

> *Be it enacted* * * * That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and, in the case of coal, oil, oil shale, or gas, to municipalities: * * * *And provided further*, That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act. (U. S. C., Title 30, Sec. 181.)

13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. * * * Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument,

stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified. * * * (U. S. C., Title 30, Sec. 221.)

14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: * * *. (U. S. C., Title 30, Sec. 223.)

16. That all permits and leases of lands containing oil or gas, made or issued under the provisions of this Act, shall be subject to the condition that no wells shall be drilled within two hundred feet of any of the outer boundaries of the lands so permitted or leased, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners, and to the further condition that the permittee or lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by him to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits. Violations of the provisions of this section shall constitute grounds for the

forfeiture of the permit or lease, to be enforced through appropriate proceedings in courts of competent jurisdiction. (U. S. C., Title 30, Sec. 225.)

32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (U. S. C., Title 30, Sec. 189.)

35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the

construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: * * *. (U. S. C., Title 30, Sec. 191.)

The Withdrawal Act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, c. 369, 37 Stat. 497, provides:

1. That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (U. S. C., Title 43, Sec. 141.)

2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further,* That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands

made prior to June twenty-fifth, nineteen hundred and ten: *And provided further,* That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (U. S. C., Title 43, Sec. 142.)

3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

General Land Office Circular No. 672, promulgated on March 11, 1920, under Section 32 of the Act of February 25, 1920, provides in part (47 L. D. 437, 438):

> It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant.

Order No. 337, of the Department of the Interior, promulgated March 16, 1929, provides:

> The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.
>
> There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.
>
> Probably in none of the cases on hand has the applicant expended money for developmental purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.
>
> Where land covered by pending applications is likely to be drained by adjoining wells on privately owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.
>
> With regard to the 20,000 outstanding permits on public lands, the Department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the Solicitor of the Department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations.

Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint-drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.

(Signed) RAY LYMAN WILBUR,
Secretary.

Order No. 338, of the Department of the Interior, promulgated March 20, 1929, provides:

The following outlines the general procedure in the Department of the Interior for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the Solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to deter-

mine whether permittees have acquired equities which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights; or question of similar character, they

should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy; otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields where a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration.

13. Permits issued and outstanding in Executive Order Indian Reservations under the act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.

APPENDIX B

DEPARTMENT OF THE INTERIOR PRESS RELEASES

On March 13, 1929, the Department of the Interior released the following memorandum to the press (No. 618, R. 3–4; No. 704, R. 5–6):

Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further appli-

cations for permits to prospect for oil and gas on the public domain, and to reject all applications now pending.

These instructions are in accordance with the statement issued at the White House yesterday to the effect that "there will be complete conservation of Government oil in this administration."

Permits to prospect for oil and leases of land for its development have in the past been issued under the act of February 25, 1920. That act states "that the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe to grant to an applicant qualified under this act a prospecting permit."

The General Land Office, in its Circular No. 672, says: "It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant."

On March 16, 1929, the Department of the Interior released the following memorandum to the press (No. 618, R. 4–5, 18–19; No. 704, R. 7–9):

Secretary Ray Lyman Wilbur, of the Department of the Interior, to-day issued a departmental order appointing a committee of three to pass upon outstanding permits to prospect for oil and gas on Government lands and to make recommendations as to which of those permits should be canceled. The members of that committee are the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. The order

also lays down the general policy with relation to these permits to be followed by the department. In detail it follows: [Here followed Order No. 337, pp. 51, 52, *supra.*]

APPENDIX C

EXTRACTS FROM REPORTS OF CONGRESSIONAL COMMITTEES IN REGARD TO THE BILL WHICH BECAME THE WITHDRAWAL ACT OF JUNE 25, 1910, c. 421, 36 STAT. 847

Senate Report 171, 61st Cong., 2d Sess., is in part as follows:

> The power conferred upon the President by the proposed substitute is a power that he has possessed and exercised almost from the inception of our public-land system and is a power that he still possesses and exercises.
>
> * * * * *
>
> The statutes cited, as well as the decisions of the court above referred to, and other decisions that might be cited, as well as the opinions of the Attorneys General, all go to show that the President of the United States has the inherent power to reserve for public purposes lands of the United States from location, sale, or entry.
>
> It is only lately that this power has been doubted and questioned, and the object of the proposed substitute is to make it definite and clear beyond all dispute that the President possesses this power of withdrawal. The only change in existing law, as interpreted by the courts, is that part of the proposed substitute which provides that the "Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of withdrawals."

House Report 983, 61st Cong., 2d Sess., being the report of the majority, contains the following:

> This bill grants to the President authority to withdraw from location, settlement, filing, and entry public lands, first, for public uses; second, for examination and classification to aid in administering the existing law; third, to conserve the public domain pending legislative action when in the judgment of the President public interest requires it.
>
> The President has authority to withdraw lands for certain purposes, but there is a difference of opinion as to the extent of that authority. Many claim this authority is as broad as that provided for in this bill; others contend to the contrary. No statute has been found expressly conferring this authority, and the extent thereof has not been settled by the Supreme Court.
>
> During the past few years large areas of the public domain have been withdrawn for classification and submission to Congress of recommendations of legislation relative thereto with a view of protecting and conserving public interest in valuable oil, coal, and other mineral land, water-power sites, etc. Since some of the withdrawals attempts have been made by different parties to appropriate land so withdrawn, upon the theory that the withdrawals were unauthorized. Hence the provision in the bill ratifying and confirming prior withdrawals. In view of the conflicting opinions that exist as to the authority for past and future withdrawals, it is deemed necessary to adopt a measure that will clearly define the extent of such authority. The importance of this legislation in aid of conserving such resources for the people is too manifest to require comment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, *Petitioner,*

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent.*

MOTION OF the Attorney General of the State of Utah, for leave to file brief as amicus curiae, and brief of amicus curiae.

GEORGE P. PARKER,
Attorney General of the State of Utah, as amicus curiae.
Salt Lake City, Utah.

Of Counsel:
PETER Q. NYCE,
National Press Building,
Washington, D. C.

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vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the State of Utah, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

GEORGE P. PARKER,
Attorney General of the State of Utah, as amicus curiae.

Of Counsel:
PETER Q. NYCE,

IN THE

SUPREME COURT OF THE UNITED STATES.

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vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent.*

BRIEF OF THE ATTORNEY GENERAL OF UTAH AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

The State of Utah under Section 35 of the Leasing Act is entitled to receive 37½ per centum of the royalties accruing to the Government from production of oil and gas on public lands within the state, such money to be used for the construction and maintenance of public roads, the support of public schools or public educational institutions, as the Legislature of Utah may direct.

Since the passage of the Act of February 25, 1920, and up to June 30, 1930, there has been paid to the State of Utah, from royalties received on account of oil and gas, the sum of $12,756.47.

The total receipts to the Government on account of oil and gas under the Leasing Act from its passage to June 30, 1930, amounted to $33,942.94.

There are within the State of Utah, in excess of 23,881,445 acres of vacant public lands to which the act of Feb. 25, 1920, is applicable.

Less than 3 per cent of the oil produced in the United States is produced in the so-called Rocky Mountain States. It is readily observed that no question of conservation is involved in the suspension of the Leasing Bill by the Secretary of the Interior.

Revenue Derived from Taxes on Tangible Property Within Utah Used in Operations Under Permits Authorized by the Leasing Bill.

It is estimated that in conducting operations under permits and leases on the public lands, permittees, lessees and operators have expended approximately five million dollars. The majority of this vast amount of money has been invested in property used in drilling operations. Such property is subject to tax by the state and produces revenue. The change in policy in the matter of issuing oil and gas permits has resulted in a burden to Utah, because of the loss of revenue from such taxable property.

Employment.

Operations conducted under permits and leases issued under the Leasing Act, provide employment for

in the premises as to this Honorable Court may seem meet and just.

GEORGE P. PARKER,
Attorney General of the State of Utah,
as amicus curiae.

Counsel:
PETER Q. NYCE.

a vast number of men. The suspension of the Act by the Secretary has stopped much of such employment, thus adding to the unemployment situation not only in Utah, but in other States.

Natural Resources Available to Utah.

As a result of operations conducted under the Leasing Act and oil and gas permits heretofore issued thereunder, large quantities of natural gas have been discovered on public lands in states adjacent to Utah, with the result that enormous expenditures of money have been made in the construction of pipe lines, transporting a part of this natural gas for use in Salt Lake City, Ogden and other cities in Utah. This has not only resulted in great benefit to the residents of those cities, but has provided employment and created within the state tangible property subject to tax.

The residents of these cities are vitally interested in seeing that this natural resource is continually made available for their use and the supply maintained for future use.

The quantity of natural gas in a given field can not be determined with entire accuracy, for which reason it is necessary for operators to build up a reserve supply of natural gas to meet the needs of the cities served by their pipe lines. This can only be done by developing natural gas fields prior to the time they are actually needed to supply the demand.

Under the policy of the Secretary of the Interior, operations on the public land to develop further reserve supply of natural gas are precluded, with resulting injuries to Utah by reason of the loss of revenue from taxation and the possibility that the residents of Utah will be deprived of the advantages accruing to them from the use of natural gas.

ARGUMENT.

The Intent of Congress in Passing the Leasing Act.

In Smyth v. Fiske, 23 Wall. 380, it is said:

> "Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction. The pre-existing law, and the reason and purpose of the new enactment are also considerations of great weight."

The title says it is to "promote" the mining of oil and gas, etc. What was said in the reports to and in the debates in Congress? Senator Smoot, the author of the Bill, said (Cong. Rec. Aug. 21, 1919, Vol. 58, Pg. 4, Pgs. 4111, 4112, 4113, 4114):

> "There are hundreds of millions of acres of the public domain withdrawn from entry of all kinds, and through those withdrawals new development of the natural resources in the western states has practically ceased, and something must be done to change present conditions * * * If we are to develop the public lands of the West, and if we are to begin the exploration and the discovery of these minerals so necessary for the prosperity of our country, legislation must be had, and had at an early date."
>
> "I am in close touch, not only with the men producing oil today, but I have been in close touch with the men who desire to go upon the public domain and prospect for oil and take their chances in discovering it; but all known oil lands have been tied up by withdrawals for many years past and prospecting upon public lands has been limited, indeed. * * * the best thing to do is to try a leasing system, and the best plan is to prepare a bill along the line that will best meet

the situation; and that is what I have tried to do." * * * "The time has come, in the opinion of the committee on Public Lands, that legislation must be passed in order that these great undeveloped resources of our country shall be made use of by the American people."

"* * * The amendment that has been made to the bill simply states that: 'The Secretary of the Interior shall have the right to offer for sale for periods of not exceeding five years'" * * * *Mr. Kendrick*: "Does the Senator from Utah not see in that amendment a weakening of the mandatory power to sell royalty oil?" * * * "Would the Senator not accept this as a substitute for the amendment already adopted: 'The Secretary of the Interior is authorized to sell for periods of not more than five years." * * * Mr. Smoot: "Under the amendment suggested by the Senator from Wyoming (Mr. Kendrick), the Secretary will be compelled to sell the oil."

The House Report (66th Congress, 1st Session No. 398) said:

"Your committee believes that the present draft represents an improvement on all previous bills, and that if enacted into law will promote the prospecting and development of the mineral deposits in the public lands with due protection to the public interest."

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules of this court, the State of Utah says that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be, settled by this court.

CONCLUSION.

Other questions involved in the instant litigation are discussed at length in the petition for writ of certiorari and supporting brief and briefs amici curiae, heretofore filed by the States of Colorado, Wyoming, New Mexico and Montana. I hereby adopt the allegations contained in said petition for the writ, the arguments made in the supporting brief and briefs amici curiae referred to hereinabove. The legal questions involved in this controversy have been considered by five judges, three of whom have agreed with petitioner's view of the law. Justices Siddons and Bailey of the Supreme Court of the District of Columbia and Justice Van Orsdel in a dissenting opinion in the Court of Appeals of the District of Columbia have supported the petitioner's view of the law of the case. Because of the disagreement between the Courts considering the law involved, the unsatisfactory effect of the decision of the majority opinion of the Court of Appeals upon the interest of the State of Utah, it is urged that this Honorable Court direct that writ of certiorari be issued out of and under the seal thereof, directed to the Court of Appeals of the District of Columbia, commanding that Court to certify and send to this court for its review and determination on a day certain to be therein named, full and complete transcript of record and all proceedings in the case numbered and entitled on its docket No. 5247, Ray Lyman Wilbur, Secretary of the Interior, Appellant, vs. United States of America ex Relatione Ethel M. McLennan, Appellee; that said judgment of the Court of Appeals of the District of Columbia be reversed by this Honorable Court and that Petitioner may have such other and further relief

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vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent*.

MOTION OF the Attorney General of the State of Montana, for leave to file brief as amicus curiae, and brief of amicus curiae.

L. A. FOOT,
Attorney General of the State of Montana, as amicus curiae.
Helena, Montana.

Of Counsel:
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. MCLENNAN, *Petitioner,*

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the State of Montana, respectively moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

L. A. FOOT,
Attorney General of the State of Montana, as amicus curiae.

Of Counsel:
PETER Q. NYCE,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 618.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, *Petitioner*,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent*.

BRIEF OF THE ATTORNEY GENERAL OF MONTANA AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

Pursuant to Section 35 of the Leasing Act, Montana is to receive 37½ per centum of the royalties accruing to the Government from production of oil and gas on public lands within that state. Such money in accordance with the Leasing Act is to be used for the construction and maintenance of public roads, the support of public educational institutions, as the Legislature of the State may direct. Under the terms of this Act, Montana has received up to June 30, 1930, royalties on account of oil and gas amounting to approximately $592,110.57.

The total receipts to the Government on account of oil and gas under the mineral leasing act of February 25, 1920 from the passage of the Act, to June 30, 1930, from lands within the State of Montana, approximates the sum of $1,527,398.75.

There are at the present time, within the State of Montana, in excess of 6,601,677 acres of vacant public lands, subject to disposition under the act of February 25, 1920.

Revenues Derived from Taxes on Tangible Property Within the State of Montana Used in Operations Under Permits Authorized by the Leasing Bill.

A vast amount of money has been expended by permittees, lessees and operators in drilling for oil and/or gas, building roads, bridges, warehouses, camps and machine shops, etc. All of this tangible property is subject to tax by the state and produces revenue. The change in policy in the issuing of oil and gas permits has resulted in a burden to this state because of the loss of revenue from such taxable property.

Employment.

Operations conducted under permits and leases issued under the Leasing Act, provide employment for a vast number of men. The suspension of the Act by the Secretary has stopped much of such employment, thus adding to the unemployment situation not only in Montana, but in other states as well.

ARGUMENT.

The Intent of Congress.

The intent of Congress in passing the Leasing Act, the question of whether the Secretary of the Interior has discretion to suspend the Act and whether there was an actual withdrawal, are discussed at length in Petitioner's brief and the briefs amici curiae filed on behalf of New Mexico and Utah.

The authority vested in the Secretary of the Interior by the Leasing Act is mandatory and not permissive.

The English Rule.

Mac Dougall v. Paterson, Common Bench Reports 15 Victoria 755, announces the rule as follows:

> "Where a statute confers an *authority* to do a judicial act in a certain case, it is *imperative* on those so authorized, to exercise the authority when the occasion arises, and its exercise is duly applied for by a party interested, and having the right to make the application." (1851.)

In Endlich on Interpretation of Statutes 423 is the end of a discussion of the English cases on this rule in which it is said:

> "But as regards the imperative character of the duty, it was laid down by the King's Bench that words of permission in an act of Parliament when tending to promote the general benefit are always held to be compulsory."

In Mayor v. Furze, 3 Hill 612 (N. Y), Chief Justice Nelson said:

"The inference deducible from the various cases on this subject seems to be that, where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory."

The above case and several others along the same line are cited and followed in People v. Commissioners of Land Office, 207 N. Y. 42, 100 N. E. 735, in the following language:

"It is an old and well recognized rule of statutory construction that when the act to be done concerns the public interest, or the rights of third persons, permissive words conferring power, or authority, upon public officers, or bodies, will be construed as mandatory."

In P. D. Ronde & Company v. United States Sugar Equal. Board, 299 Fed. 659, the following language,

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President is authorized to require the United States Sugar Equalization Board (Inc.) to take over from the corporation P. D. Ronde & Company, Inc., said transaction entered into and carried on by said corporation, etc."

was held to be mandatory on the President.

The court after a careful examination of many authorities including Supervisors v. United States (cited and quoted from at page 16 of Petitioner's brief) decided that the act was mandatory. An appeal was

taken to the Third Circuit Court of Appeals and the case was there affirmed in U. S. Sugar Equalization Board v. P. D. Ronde & Company, 7 Fed. (2d) 981. The Circuit Court of Appeals said:

> "The resolution of Congress by which President was 'authorized' to require U. S. Sugar Equalization Board, Inc., to pay loss to importer of sugar for which Government was morally responsible, held mandatory; 'authorized' meaning 'directed.'"

The court also held that

> "Since Congress may not delegate legislative authority to any person it follows that it may not give to any one absolute discretion to ignore or nullify, without conditions, a law which it has enacted. This would in effect be the delegation of legislative power. Such a delegation of power would involve a discretion of what the law should or should not be, or that it should not be at all." (citing authorities.)

The court stated that the Senate and House Committees regarded this resolution as mandatory and cited cases to show that the reports of the committee's interpretation of the meaning of the resolution are entitled to careful consideration. It is a late case having been decided on August 10, 1925.

The Lord Mansfield Rule.

In 1 Burrow's Report 445, King's Bench, 4th edition, Rex v. Loxdale, Lord Mansfield in 1758 announced the following rule to determine whether an act of Parliament was mandatory or directory. He said:

"There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory. The precise time, in many cases is not of the essence."

This rule has been followed by many courts in the United States.

In Apollo Boro v. Clopper, 44 Pa., Superior Court 405, it was said:

"Perhaps Lord Mansfield's rule in Rex v. Loxdale, 1 Burr. 445, is a better one (and this is the second rule we have in view) that, whether a statute is mandatory or not depends on whether the thing directed to be done is the essence of the thing required."

The same language is used in Norwegian Street, 81 Pa. State 354.

The same statement is made in Deibert v. Rhodes, 140 Atl. 515 (Pa.), where it is also said:

"The test whether a statute is mandatory depends on whether the thing directed to be done is of essence of the thing required."

The court in that case also said:

"Whether particular statute is mandatory or directory does not depend on form but on legislative intent, to be ascertained from consideration of entire act, its nature, its object, and consequences resulting from construing it one way or the other."

The same rule is followed by the Supreme Court of Oregon in Stevens v. Tillamook County, 273 Pac. 716, where it is said:

"It has been said, and we think correctly, that the true distinction between a mandatory statute and one which is only directory is this: Where the provision of the statute is the essence of the thing required to be done and by which jurisdiction to do it is obtained, it is mandatory, but where it relates to form and manner and where an act is incident or after jurisdiction has been obtained it is directory" (citing Potter's Dwarres on Statutes and Constitution, pp. 221 and 225 and footnote, p. 224).

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules of this court, the State of Montana says that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be, settled by this court.

CONCLUSION.

Having thus shown that the State of Montana is vitally affected by the action of the Secretary in suspending the Leasing Act of February 25, 1920, through loss of royalties from production thereunder, as a result of the loss of taxes on tangible property used in operation under the said act, and resulting unemployment from the fact that no further permits are being granted on which operations may be conducted, The State of Montana hereby adopts the brief of petitioner filed herein and insists that it was not the intent of Congress that the Secretary of the Interior should suspend the operation of the Act of February 25, 1920 as has been done by the promulgated orders Nos. 337 and 338 referred to in petitioner's brief.

WHEREFORE, it is respectfully urged that this Honorable Court should grant a writ of certiorari to review the decision of the Court of Appeals of the District of Columbia, reverse same and direct that a writ of mandamus issue to compel the Secretary of the Interior to receive and file petitioner's application for permit, consider same on its merits and grant a prospecting permit under the Act of February 25, 1920.

Respectfully submitted,

L. A. Foot,
Attorney General of the State of Montana as amicus curiae.

Of Counsel:
Peter Q. Nyce.

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IN THE

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No. 618.

THE UNITED STATES OF AMERICA,
EX RELATIONE ETHEL M. McLENNAN,
Petitioner,
vs.
RAY LYMAN WILBUR, Secretary of the Interior,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

The undersigned, as counsel for the State of Colorado, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

CLARENCE L. IRELAND,
Attorney General of the State of Colorado.

Of Counsel:
PETER Q. NYCE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1930.

No. 618.

THE UNITED STATES OF AMERICA,
EX RELATIONE ETHEL M. McLENNAN,
Petitioner,
vs.
RAY LYMAN WILBUR, Secretary of the Interior,
Respondent.

BRIEF OF CLARENCE L. IRELAND, ATTORNEY GENERAL OF COLORADO AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The State of Colorado is vitally interested in the outcome of this litigation for the following reasons:

Section 35 of the Act of February 25, 1920, here in controversy, provides as follows:

> "That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from

Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as 'Miscellaneous receipts.'"

41 U. S. Statutes at Large, 450.

In 1925, the Colorado General Assembly enacted a statute providing, in substance, that of the revenues received by the state pursuant to said Section 35, two-thirds (2/3) should be apportioned to the divers counties wherein such revenues originated, to be used in the construction and maintenance of public highways, and that the remaining one-third (1/3) of such revenues should be paid over to the Colorado State School of Mines for such uses as the Board of Control thereof may determine. (See Session Laws of Colorado, 1925, Chapter 138, pages 386-387.) Such Act is still in force and effect.

Since the passage of the Act of February 25, 1920, and up to June 30, 1930, there has been paid to the State of Colorado from receipts from oil and gas under the Act the sum of $119,156.09.

The total receipts to the Government on account of oil and gas under the mineral Leasing Act of February 25, 1920, up to June 30, 1930, amounted to $336,002.18.

Less than 3 per cent of the oil of the United States is produced in the Rocky Mountain States. The question of conservation is not involved in the instant litigation. The suspension of the Leasing Act by the Secretary on conservation grounds is not tenable.

Within the borders of the State of Colorado, there are many thousands of acres of undeveloped public lands of the United States which are subject to prospecting and leasing under the terms of said Act of February 25, 1920, and which are believed by competent authorities to contain oil and gas in vast quantities which could and would be produced and marketed with sufficient profit to induce the development of said lands, unless prohibited by the action of the Secretary of the Interior as complained of by petitioner in this litigation; and that within the borders of said state there are in excess of 8,027,468 acres of such public lands subject to the terms of said Act of Congress of February 25, 1920.

Such lands would be persistently and energetically prospected and steadily developed, were it not for the alleged withdrawal orders of the respondent complained of in this litigation. The effect of such orders is, therefore, to unduly retard the development of these immense natural resources of the state, as well as of other industries which would be fostered by the

development and use of these resources. The result is to seriously affect the growth, well-being and prosperity of this state and of its people, and to deprive the state of the very considerable revenues which, through the development of said natural resources, would accrue to it under said Section 35.

Revenue Derived from Taxes on Tangible Property Within Colorado Used in Operations under Permits Authorized by the Leasing Bill.

It is estimated that in conducting operations under permits and leases on the public lands, permittees, lessees and operators have expended approximately five million dollars. The majority of this vast amount of money has been invested in property used in drilling operations. Such property is subject to tax by the State and produces revenue. The change in policy in the matter of issuing oil and gas permits has resulted in a burden to Colorado, because of the loss of revenue from such taxable property.

Employment.

Operations conducted under permits and leases issued under the Leasing Act, provide enployment for a vast number of men. The suspension of the Act by the Secretary has stopped much of such employment, thus adding to the unemployment situation not only in Colorado, but in other states.

Application for Permit is Property.

The proceedings in the Department as shown by Orders Nos. 337 and 338 were had upon the theory that the Secretary of the Interior had the authority

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IN THE

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OCTOBER TERM 1930.

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EX RELATIONE ETHEL M. McLENNAN,
Petitioner,
vs.
RAY LYMAN WILBUR, Secretary of the Interior,
Respondent.

MOTION OF CLARENCE L. IRELAND, ATTORNEY GENERAL OF THE STATE OF COLORADO, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

CLARENCE L. IRELAND,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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to reject all applications, not on their merits but at his will. This is shown by the directions of the Secretary to the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits and to reject all applications then pending (R. 3). Reference is made to paragraph 3 of Circular No. 672 wherein it is stated "The granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior and any application may be granted or denied either in part or in its entirety as *the facts may be deemed to warrant.*" (R. 4) The "facts" were not considered at all because the local land offices were not to "receive" further applications and were to "reject" all applications then pending. The effect of this Order was to arbitrarily reject all applications without regard to the facts. This amounted to a suspension of the Leasing Act. This construction of the Act was not sustained by Justices Van Orsdel of the Court of Appeals of the District of Columbia and Siddons and Bailey of the Supreme Court of the District of Columbia (R. 33-35) and was entirely ignored by Justice Robb in his opinion. The Court of Appeals decided this case upon the theory that the Secretary of the Interior by his Orders suspended the Leasing Act under the Withdrawal Act of June 25, 1910. To determine the purpose of Congress in passing the Act of February 25, 1920, reference may be made to the rulings of the Department prior to March 13, 1920. Section 13 of the Leasing Act provides how *preference* rights may be obtained by erection of monuments on land prior to the granting of the prospecting permit. In Haynes vs. Smith, 50 L. D. 208-211, it is said:

> "It is perhaps needless to state that this Department has no legislative power and must leave to the action of Congress any suggested amendments of the Act of February 25, 1920."

In that case, it was said:

> "The rights of an applicant for a prospecting permit for oil and gas under Section 13 of the Act of February 25, 1920 pass, on the death of the applicant, to his or her personal representatives in the same way as other personal property."

So the "right" to a prospecting permit is recognized by the Department as *property* which will pass on the death of the applicant to his heirs the same as other personal property. As the act itself in Section 13 provides for a *preference* right and as the Department in this and other decisions has held that the *"right"* is "property", it is certain that it cannot be taken away at the mere will or whim of the Secretary of the Interior. In the supporting brief of the petitioner and in the briefs tendered by the Attorneys General of several states, the authorities have been assembled showing that the duty to grant a permit "as the facts may be deemed to warrant" is mandatory on the Secretary of the Interior and not permissive only. Under these circumstances, this brief will discuss only the question as to whether the act of the Secretary in his Orders amounted to withdrawal of all public lands under the Act of June 25, 1910. (See also 48 Land Decisions 98,—Instructions by Secretary of Interior quoted in petition for writ of certiorari, page 14.)

Did Orders Nos. 337 and 338 of the Secretary of the Interior Constitute a Withdrawal under the Act of June 25, 1910?

The opinion of the Court of Appeals of the District of Columbia is based upon the propbsition that the action of the Secretary of the Interior in making Orders Nos. 337 and 338 in March, 1929, amounted to a withdrawal under the Act of June 25, 1910. The question at once arises "Did the Department treat these Orders as a withdrawal under that Act?" While the decision of the Department is not conclusive on this court, yet it is very persuasive and may be taken into consideration in determining whether there was such withdrawal. In the Congressional Record of January 15, 1931, beginning at page 2325 are printed the reports of the Secretary of the Interior to Congress, under the Act of June 25, 1910, for three years, the year prior to 1929, the year following 1929 and the year in which these Orders were made.

In the report for 1929, which includes the period from December 1, 1928, to November 30, 1929, in which these Orders were made, it is noted, on page 2329, that there had been withdrawn, prior to December 1, 1928, 5,494,042 acres of petroleum lands but that there were no withdrawals from December 1, 1928, to November 30, 1929, and that the then outstanding number of acres withdrawn were 5,494,042, which was the same number as at the beginning of that period. In the Annual Report of the Commissioner of the General Land Office for the fiscal year ending June 30, 1929, page 16, is the following:

> "WITHDRAWALS AND RESTORATIONS * * * OIL. 92,140 acres heretofore withdrawn as potentially valuable for petroleum were restored to entry during the year. *No withdrawals were made.*"

It is therefore noted that while there were 92,140 acres restored to the public domain during this period no withdrawals were made. Section 3 of the Act of June 25, 1910, is as follows:

> "The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

Section 1 of the Act provides as follows:

> "The President may at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water power sites, irrigation, classification of lands, or other public purposes to be specified in the Orders of Withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

The purpose of the reports required in Section 3 is apparent when that section is considered in connection with Section 1. Congress under the Constitution is charged with the duty of disposal of the public lands. It has given authority to make *temporary* withdrawals provided reports are made to Congress at the beginning of the next regular session. This is done so that Congress may revoke such Orders of Withdrawal. As the Secretary of the Interior did not consider his refusal to accept prospecting permits

after March 16, 1929, as a withdrawal of the public lands covered by the applications for permits, he did not include them in his report to Congress on December 10, 1929. The Act of June 25, 1910, provides that the Orders of Withdrawals shall specify the purposes for which the withdrawals were made. Since no Orders of Withdrawals were made, the Secretary of the Interior did not report any withdrawals to Congress.

The District Court of Appeals held that the Act of June 25, 1910, was in full force and effect and was not repealed by the Leasing Act of February 25, 1920.

The Court of Appeals of the District of Columbia, after discussing the proposition of withdrawal under the Act of June 25, 1910, says that there might be an implied power under the Act of February 25, 1920, for such a withdrawal. The answer to that is that the act contains no such authority and it cannot be assumed that there is such an implied power in that act. Congress alone, under the Constitution, has jurisdiction over the Public Lands, and passed the act of June 25, 1910, providing how the public lands may be withdrawn. That Act is exclusive.

If the terms of the act of June 25, 1910, have not been complied with then there is no withdrawal under any law.

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules of this court, the State of Colorado says, that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be. settled by this court.

CONCLUSION.

The question of whether there was a withdrawal of the public lands from the filing of applications for prospecting permits under the Leasing Act; whether the Act itself is mandatory or permissive and whether the Secretary has power to suspend the Act, are discussed at length in Petitioner's brief and in briefs amici curiae filed on behalf of other of the public land states affected by the Secretary's action.

Having thus set forth the interest of the State of Colorado in this litigation, this Honorable Court is urged to grant Petitioner's application for writ of certiorari; to reverse the decision of the Court of Appeals of the District of Columbia and direct that a writ of mandamus issue to compel the Respondent to receive and file the application for prospecting permit under the Act of February 25, 1920.

Respectfully submitted,

CLARENCE L. IRELAND,
Attorney General of the State of Colorado, as amicus curiae.

Of Counsel:
PETER Q. NYCE,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. MCLENNAN, *Petitioner*,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the State of Wyoming, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

J. A. GREENWOOD,
Attorney General of the State of Wyoming.

Of Counsel:
PETER Q. NYCE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

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THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, *Petitioner*,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent*.

BRIEF OF THE ATTORNEY GENERAL OF WYOMING AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The State of Wyoming appears in this litigation because of its very great and vital interest in the development of its oil and gas resources and sets forth the following:

First: The State has received and is receiving from the Federal Government a very large, though diminishing, income under section 35 of the leasing act of February 25, 1920, section 35 thereof, providing as for our present purposes as follows:

"* * * 37½ per centum of the amounts derived from such bonuses, royalties and rentals shall be paid by the Secretary of the Treasury after the expiration of the fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct:" * * *

Second: That since the operation of such act began from 1920 to 1930, both inclusive the State has received as its 37½ per centum of the amounts derived from such bonuses, royalties and rentals, on account of oil and gas, under the provisions of said Act, the sum of $19,646,749.06.

Third: That provision was made by the Legislature of Wyoming for the disposition of the said 37½ per centum of the amounts so derived from such bonuses, royalties and rentals, under chapter 28, Session Laws of Wyoming of 1923, in substance as follows:

(a) 3 per centum to counties in which the oil was produced, to be expended by such counties in the construction and maintenance of permanent roads and highways;
(b) 3 per centum to be placed to the credit of the State Highway Commission and expended by it on permanent construction or maintenance in the county of the origin of the fund;
(c) 35 per centum to be placed to the credit of such Commission and expended by it on permanent construction or maintenance work, provided that there shall be expended in

each county of the State, its proportion of at least 75 per cent of such total amount so appropriated for its highway construction and the maintenance thereof; and the proportion so apportioned to each county, shall be determined:

(1) 50 per centum in the ratio that the assessed valuation of each county bears to the total assessed valuation of the State;
(2) 50 per centum in the ratio that the total mileage of state highways in each county, bears to the total mileage of state highways in the state

And not to exceed 15 per cent thereof shall be used by the Commission in engineering, supervising and other overhead expense;

(d) 50 per centum for teachers and school bus drivers;

(e) 9 per centum to the University of Wyoming;

Fourth: That there is no overproduction of oil in the Rocky Mountain States, as a ready market is found for all production in the area supplied; that the production therein is downward; and the amount of oil being produced is only about one-half that of six years ago; and the total production of the area, consisting of Colorado, Utah, Montana, New Mexico and Wyoming, is less than three per cent of the total production of the nation; and the present established refineries are running on only about one-half capacity; and the policy of shutting in production is followed whenever necessary;

That as an evidence of the fact that there is no

overproduction of oil in Wyoming, attention is invited to the following paragraph which appears in the Petition for leave to Intervene, recently filed by the Secretary of the Interior in the case of Public Service Commission of Wyoming, Complainant, vs. Chicago, Burlington & Quincy Railroad Company and Chicago & Northwestern Railroad Company, defendant, before the Interstate Commerce Commission.

> "III. That the lands which would be traversed by the proposed branch line and lands adjacent thereto to the west and south were formerly a part of the Shoshone or Wind River Indian Reservation. Part of the lands including those within the limits of the reclamation project, above described, were opened to disposition under the public land laws of the United States, the sale price per acre of the agricultural lands and the mineral receipts to be devoted or paid to the Indians. On these lands to the north and west of the town of Pavillion is located the Maverick Springs Oil Field, on which at the present time there are thirty-eight oil wells drilled but now shut-in, and not producing because of the lack of transportation facilities. It is estimated by this Department that from 2,000 acres of this field, 14,000,000 barrels of oil could be recovered in about ten years' time. That the Indians who are entitled to the profits derived from this oil have for a number of years been desirous of having wells opened up and oil produced therefrom, and the building of a branch line as prayed for, would lead to the development of this field and the marketing of oil to the benefit of the Indians."

While the Secretary of the Interior takes the position that Orders Nos. 337 and 338 are conservation measures in an effort to relieve overproduction of oil,

nevertheless he has in the case cited submitted as a reason for the construction of the Branch Railway involved the fact that as a result of such construction, fourteen million barrels of oil could be recovered in about ten years' time from the Maverick Springs Oil Field in this state.

Fifth: That there is no waste of oil in such area, as the supply is not more than sufficient to meet the demand; the Salt Creek field, in Wyoming, producing about one-half of the total production of said area, being an outstanding example of fields efficiently operated under methods providing real conservation; and other fields of said area largely follow such conservation system;

Sixth: That discoveries of the future, even under most liberal policies would only gradually increase the amount of production, and would probably not compensate for the rate of depletion of existing fields;

Seventh: That development of petroleum resources is a major industry in Wyoming, and the continued enforcement of the orders of the Secretary of the Interior, is resulting in a serious decrease in the commerce and industry of the state; and the revenues of the State under said leasing act;

Eighth: That the development of oil in State and privately owned lands is being seriously handicapped, as, without control of government lands, which usually surround such state and privately owned lands, operators could seldom afford to take the hazard of prospecting in lands of small acreage, as such prospecting is carried on at great cost; unless such operators and investors have justification therefor in the

control of large acreage, in order to warrant the necessarily large expenditures incurred.

Ninth: That under the well known rule of statutory interpretation, where the language of a law is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times and the defect or mischief, which the statute was intended to remedy. We find with respect to the leasing act, and as a basis therefor, that for years the attempt to apply the oil placer mining laws to prospecting for oil and gas and to discoveries thereof, as a foundation for patent applications, was impracticable, owing to the enormous cost of drilling wells for oil and gas, leading to such discoveries, where such discoveries were not otherwise attainable; and the Department of the Interior and the Courts were besieged with controversies as to whether such a discovery had been made of oil or gas, as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying well; and that in order to settle the controversies, thus existing, as between the Federal Government and individuals; and as between individuals; but never to curtail the development of such lands; but on the contrary, to encourage development and to establish a more satisfactory method of disposal thereof by the Federal Government, and of acquiring thereof by prospectors; for the purpose of prospecting and development of such lands; the leasing act was passed; and such act was recognized as a partnership between the United States and the States and their operators and investors; and a resulting compromise between conflicting interests; and each party to the compact was benefited; and also the

States were granted a direct interest in the revenues from development (of which the State is now being deprived), in lieu of taxes that otherwise would have accrued to the states under the commercial production of oil and gas under the placer mining laws.

Tenth: That it is estimated by competent authority, there are within the State of Wyoming, 17,035,537 acres of lands in the public domain available for exploration under the said leasing act; and that this land, in recognized geological structures, would be prospected for oil and gas, if permitted under said Act.

Eleventh: That much of such prospecting and development would be done by operators engaged in such mining industry, and at their expense; which operators have demonstrated by their past and present practice in the industry in Wyoming, on public lands, where their permits are in force, and on other lands in the State; that expenditures for such purposes are justified by the markets for such oil and gas and the profits obtained both commercial and otherwise.

Twelfth: That legitimate prospecting and development of public lands in Wyoming for their oil and gas, require very extensive employment of labor in drilling wells and building roads; and, therefore, work for hundreds of men; and also the purchase of large quantities of oil well equipment and other merchandise necessary for such purposes; requiring the expenditure of very large sums of money; the drilling of some wells for oil, costing more than a hundred thousand dollars, and in some cases even as much as three hundred thousand dollars;

Thirteenth: That in reliance on the receipt of revenues under the provisions of said Act, and the inter-

pretation thereof, that it was intended to provide for continued prospecting and development of public lands for oil and gas in Wyoming, the State thereupon planned and is carrying forward a unified system of public highways, some of the main arteries of which are not only of state and local interest, but also of national importance and value as well (2) the State has also in dependence on such income; and through its State University, increased the efficiency and educational standards of that Institution; (3) and has also afforded its school children greater opportunities to secure an education by means of more numerous and more highly qualified teachers; and an assured transportation of such pupils from sparsely settled communities to centralized school buildings, where higher educational methods are attainable; and that material injury is being caused the State; and all of such public welfare activities are suffering by virtue of the said policy of the Secretary of the Interior;

Fourteenth: That accordingly, the growth, well-being, advancement, progress, welfare and prosperity of the State of Wyoming and its people, are, without lawful justification or authority, being seriously and adversely affected, as a result of the orders of the Secretary of the Interior in depriving the State and its citizens of the opportunity to develop such natural mineral resources, lying within its borders; and also of the revenues attendant thereon; and, therefore, of the power of the State to carry on its public welfare activities, as under the provisions of said leasing act it was intended it should do.

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. MCLENNAN, *Petitioner,*

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned as counsel for the State of New Mexico, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

E. K. NEUMANN,
Attorney General of the State of New Mexico, as amicus curiae.

Of Counsel:
PETER Q. NYCE,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 618.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, *Petitioner,*

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent.*

BRIEF OF THE ATTORNEY GENERAL OF NEW MEXICO AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

Pursuant to Section 35 of the Leasing Act, New Mexico is to receive 37½ per centum of the royalties accruing to the government from production of oil and gas on public lands within the State. Such money in accordance with the Leasing Act is to be used for the construction and maintenance of public roads, the support of public schools or other public educational institutions as the legislature of the State might direct.

The New Mexico legislature, in 1929, passed the following law, directing the disposition of these royalties:

> "Section 1. For the 18th and 19th fiscal years of the State of New Mexico, there is hereby appropriated for the New Mexico School of Mines from the Mineral Leasing Land Act Fund, created by Section 35, of Senate Bill No. 2775, (Public No. 146—66th Congress) the sum of Fifteen Thousand Dollars ($15,000.00), for each of said fiscal years. Any unappropriated balance in the Mineral Leasing Land Act Fund shall be turned into the fund for General State purposes.
>
> "Sec. 2. The same appropriation as made in Section 1, of this Act for the 18th and 19th fiscal years, is hereby declared to apply and be continued to, and in every fiscal year subsequent to the 19th fiscal year, unless any Legislature, subsequent to the one at which this Act is passed shall provide otherwise." (Chap. 134, New Mexico Session Laws of 1929.)
>
> "* * * Any balance in the Mineral Leasing Land Act Fund and revenues accruing to such fund not otherwise specifically appropriated shall be distributed among the state educational institutions in proportion to the several appropriations made herein for such institutions and shall apply on such appropriations." (Sec. 7, Chap. 8, Special Session Laws of New Mexico, 1929.)

Under the terms of Section 35 of the Leasing Act, New Mexico has received, since the passage of the Act of February 25, 1920, up to June 30, 1930, royalties on account of oil and gas amounting to $63,845.37. There has been received by the Government during the same period on account of oil and gas from lands situated in New Mexico, a total of $170,-

of this court, the State of Wyoming says that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be, settled by this court.

CONCLUSION.

The great interest of the State of Wyoming as hereinabove set forth compels the state to adopt the brief filed by petitioner in this case and ask this Court to grant the petition for writ of certiorari to review the decision of the Court of Appeals of the District of Columbia, which decision was rendered by two of the three judges of said Court, the third judge having rendered a dissenting opinion. The majority decision of the Court of Appeals reversed the decision of two of the justices of the Supreme Court of the District of Columbia directing a writ of mandamus to issue against Respondent. It is respectfully urged that the decision of the Court of Appeals be reversed by this Honorable Court and that said Court will direct proceedings looking to the issuance of a writ of mandamus to compel Respondent to receive and file Petitioner's application for permit, consider same on its merits and grant a permit thereon in accordance with the Leasing Act of February 25, 1920.

Respectfully submitted,

J. A. GREENWOOD,
Attorney General of the State of Wyoming, as amicus curiae.

Of Counsel:
PETER Q. NYCE,
National Press Building,
Washington, D. C.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 619.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. MCLENNAN, *Petitioner*,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent*.

MOTION OF the Attorney General of the State of New Mexico, for leave to file brief as amicus curiae, and brief of amicus curiae.

254.26. There are within the state of New Mexico, in excess of 15,664,121 acres of vacant public lands, to which the oil and gas leasing act is applicable.

It is reasonable to assume that large amounts would be received in the future covering production in New Mexico, if the terms of the Leasing Act were carried out by the Secretary instead of being suspended in accordance with the present policy, which is contrary to the intent of Congress in passing the Leasing Act.

Revenue Derived from Taxes on Tangible Property Within the State of New Mexico Used in Operations Under Permits Authorized by the Leasing Bill.

It is estimated that in conducting operations under permits and leases on the public lands within New Mexico, permittees, lessees and operators have expended approximately forty millions of dollars. A vast amount of such money has been invested in personal property used in drilling operations. Such property is subject to tax by the State and produces revenue. The change in policy in the issuing of oil and gas permits has resulted in a burden to this state, because of the loss of revenue from such taxable property.

Employment.

Operations conducted on permits and leases issued under the Leasing Act, provide employment for a vast number of men. The suspension of the act by the Secretary has stopped much of such employment, thus adding to the unemployment situation not only in New Mexico, but in other states as well.

Discretion.

The Secretary of the Interior has no discretion to suspend the Leasing Act. Any discretion given under the Act is to carry out its terms and not to make the act of no effect.

There has been nothing added to the definition of Discretion of an officer upon whom a duty has been imposed by law in over 200 years. The doctrine announced by an English Court is still good law. This is what was reported in 1719:

> "Where anything is left to any person to be done, according to his discretion, the Law intends it must be done with sound discretion and according to law: and this Court hath a Power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them, Trin. 23 Car 1 B. R. for their discretion is not properly discretion, but Folly or Madness, who act things contrary to reason and against Law." 1 Lilly's Practical Register or General Abridgement of the Law, London 1719. (B. R. Bancus Regis or Kings Bench.)

The same doctrine was announced by Chief Justice Marshall about 100 years later in Osborn v. The Bank, 9 Wheaton 866, 6 L. ed. 234:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

Following the doctrine announced in the above quotations, the Supreme Court of the United States has recently defined and limited the discretionary power of the Secretary of the Interior. The leading case on the subject is Daniels v. Wagner, 237 U. S. 547, 59 L. ed. 1102. Chief Justice White, after stating the facts, then said:

> "The claim of discretionary power is substantially this: That in a case where, under an act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation."

The above case was cited with approval by Justice VanDevanter for the Court in Payne v. Central Pacific R. Company, 255 U. S. 236, 65 L. ed. 603, in the following language construing the powers of the Secretary of the Interior:

> "Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress, as manifested in the granting Act."

This last case was recently followed and quoted from by Justice Brandeis in West v. Standard Oil Company, 278 U. S. 220, 73 L. ed. 274, again citing Daniels v. Wagner, in which he said:

> "The broad power of control and supervision conferred upon the Secretary 'does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting Act'."

Great reliance has been placed by appellant on the following paragraph in the oil and gas regulations of March 11, 1920 (page 2, G. L. O. Circular 672):

> "It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and an application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant." (Reg. 2)

It is claimed that this regulation gives the Secretary of the Interior authority to grant or deny prospecting permits at his pleasure. It will be noted, how-

ever, that under this regulation an application may be granted or denied "as the facts may be deemed to warrant." In the permits involved in these cases no attempt was made to ascertain facts peculiar to each case. All applications filed prior to March 13, 1929, were summarily rejected. All applications attempted to be filed after that date were refused without consideration of any of the facts relating to each application. Applications that were made as the result of drawings as provided by the regulations were also summarily denied. The claim is made that the Secretary of the Interior under his discretionary power has authority to suspend the act notwithstanding that the title of it is to "promote" the mining of oil and gas and Section 1 of the Act provides that these and other minerals "shall be subject to *disposition* in the form and manner provided by this Act, etc."

The Secretary of the Interior cannot enlarge by Regulation No. 2 the power given him by Section 13 of the Leasing Act. If he has no discretion to deny the filing of a prospecting permit under the act, he cannot deny the filing because of the Regulation. If there is a conflict between the Leasing Act and the Regulation, the Leasing Act controls.

In People vs. Gage, 155 N. W. 467 (Mich.), it was said:

> "Discretion lodged in the trial court is not a private, arbitrary, or personal, but a legal discretion, to be exercised according to established and well known principles of law."

The whim, opinion, or will of the officer is not the exercise of discretion. It must be an act done under the law which authorized him to act at all. It must be a sound discretion based on law.

In determining whether "authorized" in section 13 of the Leasing Act of February 25, 1920, is directory and gives the Secretary of the Interior discretion to grant or to deny an application for a prospecting permit, it is necessary to ascertain the *intent of Congress* in the passage of the act. In ascertaining that intent, it is necessary to consider the entire act, the changes made in the law as it then existed and the object and purpose of the statute.

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules of this court, the State of New Mexico says that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be, settled by this court.

Having thus set forth the interest of the State of New Mexico in this litigation, I adopt Petitioner's brief and respectfully urge that this Honorable Court grant a writ of certiorari to review the decision of the Court of Appeals of the District of Columbia, as prayed for by Petitioner, reverse said decision and direct that a writ of mandamus issue to compel the respondent to receive and file petitioner's application for permit; consider same on its merits and grant a permit under the Act of February 25, 1920.

Respectfully submitted,

E. K. NEUMANN,
Attorney General of the State of New Mexico as amicus curiae.

Of Counsel:
PETER Q. NYCE.

Nos. 618, 676, 704, 743.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA EX REL. ETHEL M. MCLENNAN, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

UNITED STATES OF AMERICA EX REL. ROY G. BARTON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. W. B. PYRON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF WYOMING, COLORADO, UTAH, MONTANA AND NEW MEXICO.

STATE OF WYOMING,
By: J. A. Greenwood,
Its Attorney General.
STATE OF COLORADO,
By: Clarence L. Ireland,
Its Attorney General.
STATE OF MONTANA,
By: L. A. Foot,
Its Attorney General.
STATE OF UTAH,
By: George P. Parker,
Its Attorney General.
STATE OF NEW MEXICO,
By: E. K. Neumann,
Its Attorney General.

OF COUNSEL:
PETER Q. NYCE.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Statements by Mr. Walsh:

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Nos. 618, 676, 704, 743.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA EX REL. ETHEL M. McLENNAN, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

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RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. W. B. PYRON, *Petitioner*,

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RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF WYOMING, COLORADO, UTAH, MONTANA AND NEW MEXICO.

The following statements appear on page 12 of Respondent's brief:

> "The briefs filed in support of numerous states require no answer inasmuch as the rights of the

states to royalties do not accrue until something is earned and received by the United States."

At pages 41 and 42:

> "The States of Utah, New Mexico, Colorado, Wyoming, and Montana asked and received permission to file briefs in behalf of the petitioners. The claim is made by these states that under Section 35 of the Leasing Act (pp. 48-49, *infra*) the State is to receive 37½ per cent of the royalties accruing to the Government from production of oil and gas on public lands within that State.
>
> "This *gratuity* depends on the contingency of discovery. There is not appropriated to these States any specific or definite sum, but the Act gives to the States 37½ per cent of the amounts realized under oil and gas leases, if, as, and when received by the United States from such leases. Consequently there is nothing due to the States until something is earned and received. That the *donation* is not based upon any vested right in the States is shown by the fact that in Section 35 of the Leasing Act all moneys accruing to the United States from oil and gas leases in the naval petroleum reserves are required to be deposited in the Treasury of the United States and retained by the United States." (Italics ours)

The position taken by the Respondents indicates that they are not familiar with the legislative history of the Leasing Act.

In the first quotation, it is stated that the briefs filed in support of the numerous States require no answer for the reason that the rights of the States to royalties do not accrue until something is determined and received by the United States. The right to royalties is not the only, or indeed the paramount

right which the States have in the question before the Court. The States do not appear as donees expecting gratuities from the Federal Government. They have a vital interest in the paramount issue involved; an interest greater than the petitioners and more important than any existing in favor of the Secretary of the Interior. The situation which prompts the states to appear here is not as stated in the brief of Respondents, to file a brief primarily in support of the contentions of the petitioners, but because a governmental policy, which has been operating satisfactorily to the States and in keeping with the purpose of the Leasing Act, has suddenly been overthrown by the Secretary of the Interior for the stated purpose of conserving oil and gas. This can hardly be the true purpose, for only 3 per cent of the oil produced in the United States comes from the Rocky Mountain States. Such production is not sufficient to meet their consumptive demands. The construction placed upon the Leasing Act during the past ten years by the manner in which it has been administered has been satisfactory to the States, and has been in keeping with their understanding of what would be done when the bill became a law.

Senator Walsh, of Montana, on August 21, 1919, when discussing this subject in the Senate, said:

> "* * * there is growing up a sentiment embryonic as yet I hope, that no disposition whatever should be made of the public lands containing these valuable mineral deposits, either by alienation or by lease; that they ought to be reserved altogether and be prospected and developed and operated by the Government. * * *
>
> "A great many of us have felt compelled,

with reference to this legislation, to yield something of our own views concerning what ought to be done in order to secure some development of these lands, and I suggest to the Senator that by opposing this measure he is serving the purpose of those who do not want any legislation on this subject at all, in the hope that the sentiment of which I have spoken will grow and develop until it will be impossible to get legislation of this character or of the character which he thinks ought to be enacted." (Congressional Record, 66th Cong., 1st Sess., Vol. 58, Part 4, Page 4112.)

That policy has been overthrown and in the departure therefrom the interest of the states in the industry which has grown up around the exploration of the public lands within the states, has been paralyzed. The Leasing Act has been suspended and in lieu thereof, the orders of the Secretary of the Interior have been set up as the policy which shall govern the development of the public lands in the discovery of oil and gas.

There is no logical basis in the language of the Act, for the construction contended for by the Secretary. The purpose of the Act was to promote, and stimulate, the exploration of the public domain in search of oil, gas and other minerals specified in the Act. A leasing bill affords the State and community an opportunity to benefit to a larger extent by the development, providing the community gets the rentals and royalties.

Hon. Frank W. Mondell, former Representative in Congress from Wyoming, as shown by the following references to the Congressional Record, successfully contended that the States should not be deprived of

the right to look to these lands as a source of taxation for revenue, and to partially reimburse the States for this loss, Section 35 of the Leasing Act, of which Mr. Mondell was the author, was incorporated in the Act.

In the Congressional Record 64th Congress, First Session, Vol. 53, Part 2, page 1117, Mr. Mondell said:

"The section as it stands provides that the royalty and rentals shall flow into the irrigation fund. My amendment provides for a division, one-half going to the State and one-half to the reclamation fund. It will be remembered that this is a radical departure from past legislation. Heretofore, we have disposed of the public lands and in due course of time they have passed into private ownership and become taxable, with all their values. We are now proposing to retain permanently from private ownership and taxation this valuable property of land and minerals.

"It is our opinion that one-half of the receipts from royalties and rentals will not more than recompense us for the actual loss in revenues through our inability to tax values retained in the hands of the Federal Government. If it were a matter of selling lands at a nominal price and then turning the money into the Federal Treasury, that would be one thing, because the land sold would become taxable and we would have an opportunity to support the institutions of government by taxing the lands. When, however, we retain the lands permanently in the hands of the Federal landlord and exact a heavy rental, to be determined by the Secretary of the Interior, surely there can be no one who has considered the matter carefully, not even my friend from Michigan, who believes that under such conditions these great rentals and royalties, running on forever, covering a large portion of the lands and resources of a State or of a community, should

all be taken out of the community, out of the State, even for so splendid a purpose as the reclamation of arid lands.

"* * * surely these communities are entitled to compensation for the loss that they must sustain to their revenues under this system; and, more than that, if there be any real, sound argument for the establishment *for* a public leasing system, its strongest pillar and support is the claim, the hope, the expectation that through such a system, with all of its annoyances, with all of its liability to check development, the community may secure larger benefits as time passes than would be secured under a system of private ownership. That is one of the strongest arguments in favor of a public leasing system. That argument goes for naught if the revenues thus received from the depletion of the resources of a State are taken beyond its borders and its people receive no benefit. The cost of the maintenance of government goes on. Roads must be built, schools must be maintained, while the revenues flowing from these enormous resources are going out of the community beyond the borders of the States, to be used for other purposes, the people left without funds or opportunity to develop their country. It seems to me this is a very fair provision. As a matter of fact, these States and communities should have all of these moneys. No other theory is consistent with our idea of government, and it is only because the reclamation fund is one contributing to the upbuilding of this same western country that we approve or agree to the proposition of half of it going into the reclamation fund."

The passing of this Act was recognized by the Congress as being a radical departure from the then established method and custom of disposing of the

public lands in the various states. Heretofore, the public lands have been disposed of and in due course of time they passed into private ownership and became taxable. The Leasing Act proposed to retain permanently from private ownership and taxation this valuable property of land and minerals. The position of the Federal Government is that of a trustee having the authority and duty to dispose of, the public lands as shown from the history of the legislation in question. The States in which these lands are located have an interest, which was that of knowing that in due course of time the title to these lands would be transferred by the Government to private ownership and constitute a source of taxation for revenue, which would enable the States to maintain their institutions of Government.

On October 30, 1919, Mr. Mondell further said:

> "Mr. Chairman, there should be no difference of opinion as to the rights of the States and their communities to be compensated for the great losses in taxing values which they will suffer by reason of holding perpetually in Federal ownership untaxed very great areas of land that will in time support large populations and require great outlay for the support of the institution of government. The only question that ever ought to be raised in this connection is as to what portion of the rents and royalties that will be received by the Government are necessary to compensate the States and their communities for their loss in taxing value. In the case of forest reserves, lands that do not entail great expense for administrative purposes, we give the States directly 25 per cent of the receipts to compensate for the losses which the State suffers by reason of its inability to tax these lands. We give 10 per cent

of those receipts for the building of roads on the reserves. We grant 10 per cent of those receipts to the fund to construct roads in cooperation with the communities on and off the reserve, so that 45 per cent of the receipts by the Federal Government from these reserved lands are paid directly to or used for purposes and expenditures which would otherwise have to be paid for by the community. The areas we are proposing to withhold from sale and taxation now are very much more valuable than the forest areas." (Cong. Record, 66th Cong., 1st Sess., Vol. 58, Part 8, page 7772.)

Over a period of ten years the question of how to accomplish the intent of Congress to create a new method of dealing with its public lands was before that body.

On February 10, 1920, Mr. Mondell said:

"We have been endeavoring for 10 years to secure legislation of this character, but this year for the first time the House has had before it a bill that is strictly a leasing measure. It therefore fulfills the desires and the expectations of those who, 10 or 12 years ago, began the agitation for what was known as the conservation of the mineral resources of the public lands. The proceeds of the rents and royalties obtained from the lands are to be divided between the States in which the minerals are produced to an extent intended to reimburse them for the loss of taxing values; the Government, with a view of covering the cost of administration; and the national reclamation fund." (Cong. Record, 66th Congress, 2nd Sess., Vol. 59, Part 3, page 2713.)

During that time, the question of what should be offered to the States in return for their giving up the

right of having the title to this land alienated by the Government to private ownership, was a vital one, and it was finally agreed that the States should have returned to them for public purposes 37½ per cent in value of the minerals produced and recovered from the lands within the respective states affected by this Act. This is neither a "gratuity" nor "donation" as stated by the Respondents in their brief. It is a solemn obligation due the States to partially compensate them for that right of taxation which they must of necessity surrender if the Government is to establish and work out its leasing policy for the development of oil and gas in the public mineral lands.

In the case of Haynes v. Smith, reported in 50 L. D. page 208, it is stated on page 211, of the opinion as follows:

> "The rights of an applicant for a prospecting permit for oil and gas under Section 13 of the Act of February 25, 1920, supra, pass on the death of the applicant to his or her personal representatives in the same way as other personal property."

Hence it is shown the States have an interest, which is more than that of a donee or recipient of a gratuity, and the Department of the Interior there recognized that the application for a prospecting permit was a property right.

And the proviso in Section 32 of said Act, in the following language:

> "That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect

> taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States,"

clearly shows that the taxing power existing in the states should not be surrendered or set aside except as to the mineral producing lands of the United States. The property of lessees of the United States should be subject to taxation by the States, even though located upon said tax exempt lands of the Federal Government.

The Leasing Act has been suspended by the orders of the Secretary of the Interior. He has presumed to dispense with an Act of Congress, and abrogate a solemn contract made by Congress with the oil producing States which have filed this Brief.

In Kendall v. United States, 12 Peters 612, 9 L. Ed. 1216, this court said:

> "It was urged at the bar that the Postmaster-General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.
>
> "To contend that the obligation imposed on the

> President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

The States agree with the position of the Petitioners that the Secretary of the Interior has no legal right to deny consideration to their applications for prospecting permits and contend that aside from the lack of legality to support the action of the Secretary of the Interior, he has violated a moral obligation to carry out the intention of the Congress as expressed in the Leasing Act.

EXECUTIVE AUTHORITY TO WITHDRAW FROM PRIVATE APPROPRIATION PORTIONS OF THE PUBLIC DOMAIN.

From Pages 27 and 28 of Respondents' Brief we quote as follows:

> "We maintain that the President had the power to withdraw the lands
>
> (1) Entirely apart from any statutory authority and
>
> (2) By virtue of the express provisions of the Act of June 25, 1910."

and Respondents rely upon the Midwest case wherein the Court said that the practice of withdrawals of public lands both mineral and nonmineral from *private appropriation* by the President without special authority from Congress dates from an early period in the history of the country. With that statement we take no issue but it does not support the position of the Respondents in this controversy.

The Act of June 25, 1910, gave to the President authority to withdraw public lands temporarily from *settlement, location, sale or entry.*

It is significant to note that the purpose justifying the action of the Executive was to prevent the title to public lands passing out of the control of the Federal Government and into private ownership. So that in neither of these sources of authority is there found a justification for the present action of the Secretary. The purpose of the Leasing Act as stated by this court in Wilbur v. Krushnic, 280 U. S. 306-319, was:

> "The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease."

Therefore, whatever may have been the implied power of the Executive prior to 1910, to temporarily withdraw the public land for private appropriation or whatever may have been his authority under the Act of June 25, 1910, to make such withdrawal, constitute neither a justification for the attempted exercise of said right after the Act of February 25, 1920. This latter Act is all inclusive. It is a complete withdrawal of all the lands affected by said Act from alienation of title by the Federal Government. There can be no withdrawal by the Executive of the lands by implied power or by statutory authority. That is forever prohibited by the terms of the Leasing Act.

An attempt to withdraw would be a vain jesture because no title, no right of possession, no interest

could be acquired in any public land without consent of the Federal Government.

The statutory authority for withdrawals of public domain under the provisions of the Act of June 25, 1910, is well stated in State of Utah v. Lichliter, 50 Land Decisions, page 236, in the following language:

> "The Act of June 25, 1910 (36 Stat. 847), pursuant to which the land now involved was withdrawn, was formal congressional recognition of this power and was intended as a limitation thereof rather than a grant of greater authority. (United States v. Midwest Oil Co. (236 U. S. 459)."

Assuming that this Act of June 25, 1910, as intimated by the language found on pages 28 and 29 of Respondent's brief is ambiguous, nevertheless the President has consistently followed the procedure prescribed in said Act since its adoption, relating to withdrawals and so had construed the Act as providing the exclusive authority for the same. In all cases of ambiguity, the contemporaneous construction of Departments and officials whose duties it is to carry the law into effect is universally held to be controlling.

Fairbanks vs. United States, 21 Sup. Ct. 649, 181 U. S. 283-45 Law Ed. 862.

United States vs. Midwest Oil Company, 236 U. S. 473, 59 Law Ed. 681, 35 Sup. Ct. 309.

CONSERVATION OF OIL AND GAS BY CONGRESS.

Much is said in the Respondents' brief on the orders of the Secretary being conservation in the public interest. The orders are directed against the Discovery of oil and gas by refusing to issue permits and not to the conservation of these minerals after they are found to exist. The conservation policy of Congress is defined in the Act of March 4, 1931, not in amending Section 13 relating to granting of permits but Sections 17 and 27 relating to permits and leases after discovery is made:

> "The Secretary of the Interior is authorized whenever he shall deem such action necessary or in the public interest, with the consent of lessee, by order to suspend or modify the drilling or producing requirements of any oil and gas lease heretofore or hereafter issued, and no lease shall be deemed to expire by reason of the suspension of production pursuant to any such order. * * *
>
> And provided further, that for the purpose of more properly conserving the natural resources * * * permittees and lessees * * * may unite with each other * * * in collectively adopting and operating under a cooperative or unit plan of development * * * whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. * * *." (Public No. 853, 71st Congress.)

The Act of the Secretary in refusing to follow the plain mandate of the Leasing Act, to promote and stimulate the discovery of oil and gas in the public domain, is not effecting a withdrawal of any public

lands but is attempting to withdraw the congressional Act itself.

Respectfully submitted,

STATE OF WYOMING,
By: J. A. Greenwood,
Its Attorney General.

STATE OF COLORADO,
By: Clarence L. Ireland,
Its Attorney General.

OF COUNSEL:
PETER Q. NYCE.

STATE OF MONTANA,
By: L. A. Foot,
Its Attorney General.

STATE OF UTAH,
By: George P. Parker,
Its Attorney General.

STATE OF NEW MEXICO,
By: E. K. Neumann,
Its Attorney General.

CLERK'S COP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 676

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JANUARY 22, 1931

CERTIORARI GRANTED MARCH 2, 1931

(35,598)

(35,598)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 676

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, PETITIONER,

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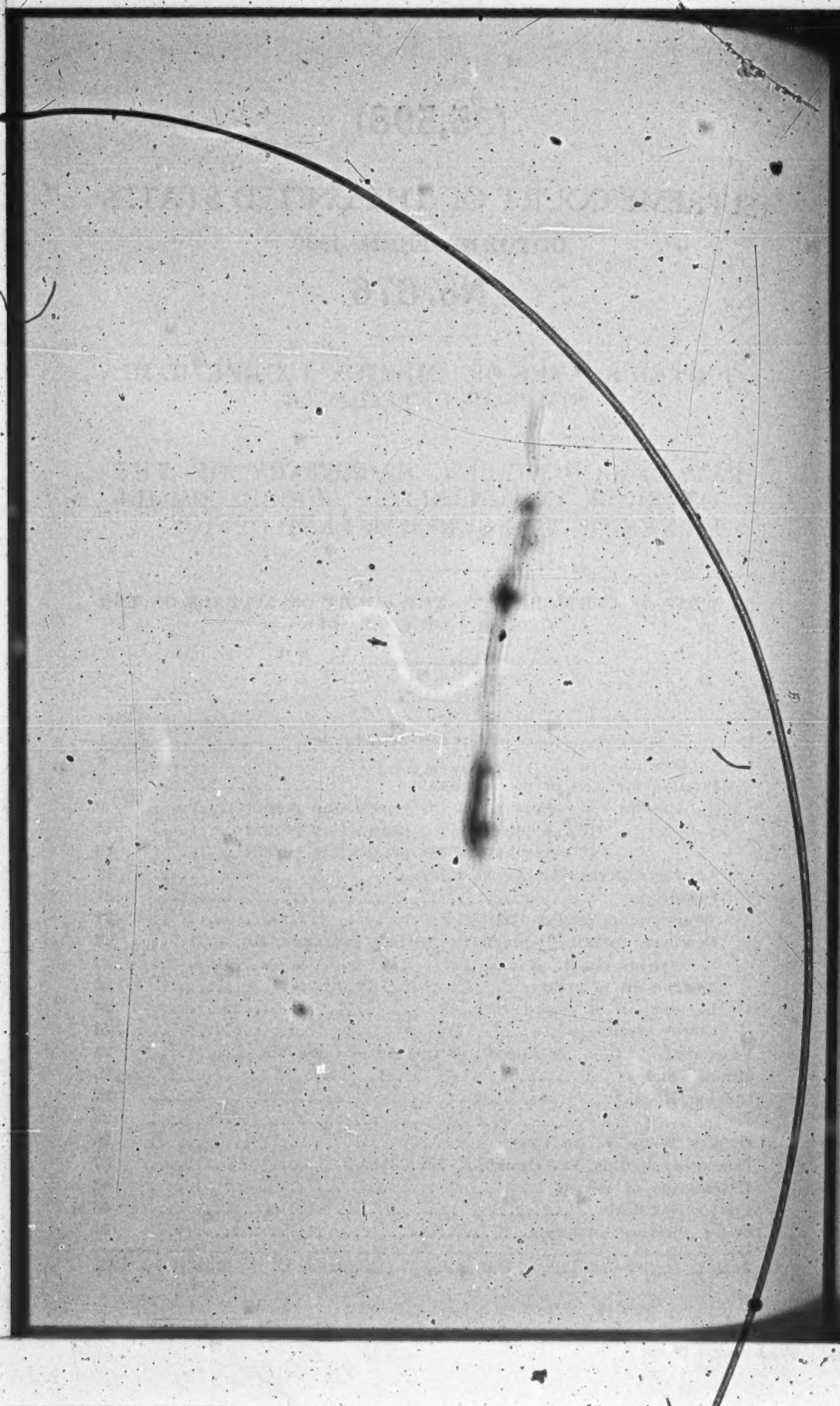

A Supreme Court of the District of Columbia

UNITED STATES OF AMERICA EX REL. H. H. Simpson, petitioner
v.
RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office, respondents } At law No. 77788

United States of America,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia

UNITED STATES OF AMERICA EX REL. H. H. Simpson, 463 I. W. Hellman Building, Los Angeles, California, petitioner
v.
RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office, respondents } At law No. 77788

Petition for writ of mandamus

Filed Feb. 20, 1930

* * * * * * *

To the honorable Judges of said Court:

Now comes H. H. Simpson, hereinafter referred to as "petitioner," and complaining of the respondents, Ray Lyman Wilbur, Secretary of the Interior (more particularly hereinafter referred to as "respondent Secretary"), and Charles C. Moore, Commissioner of the General Land Office (more particularly hereinafter referred to as "respondent Commissioner"), respectfully repesents to the court as follows:

That the petitioner is now, and at all times hereinafter mentioned was, a citizen of the United States of America, and a resident of the State of California, and that his address is 463 I. W. Hellman Building, in the city of Los Angeles, in said State.

2 That the respondent Secretary is now, and at all times hereinafter mentioned was, Secretary of the Interior, Department of the Interior, of and for the United States (and is complained of in his capacity as such Secretary), duly commissioned and acting as such Secretary, pursuant to the Constitution and laws of the United States; that said respondent Secretary has offices in the city of Washington, District of Columbia; and that among other duties imposed upon him by the laws of the United States is, and was at all times hereinafter mentioned, that of administering a certain act of Congress approved February 25, 1920 (41 Stat. 437, Ch. 85), to wit,

"An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," popularly known as, and hereinafter called, the "Oil lands leasing act."

That the respondent commissioner is now, and at all times hereinafter mentioned was, Commissioner of the General Land Office, Department of the Interior, of and for the United States (and is complained of in his capacity as such Commissioner) duly commissioned and acting as such commissioner, pursuant to the Constitution and laws of the United States; that said respondent commissioner has offices in the city of Washington, District of Columbia; and that among other duties imposed upon him by the laws of the United States is that of performing, under the direction of the respondent Secretary, executive duties respecting the public lands of the United States.

I. FIRST GROUND FOR WRIT

1. That on or about May 25, 1929, petitioner caused to be filed in the proper district land office of said Department of the Interior, located at Sacramento, California, an application (a copy of which is attached hereto, made a part hereof and marked "Exhibit A") for
3 a permit to prospect for oil and gas upon certain land located in the State of California and within the territory of said district, setting forth (a) the name and address of your petitioner as the applicant therein; (b) proof by affidavit of your petitioner of his native-born citizenship in the United States of America and his residence in the State of California; (c) a statement that the applicant was not the holder of and had no direct or indirect interest in any other subsisting permit to prospect for minerals on lands of the United States, and had no other application pending for such a permit, and that he had no interest, either direct or indirect in any other application for a permit; (d) a proper description of the land for which the permit was desired; (e) a statement that to the best of petitioner's knowledge and belief the land applied for was not within any known geological structure of a producing oil or gas field; and (f) containing at least three references as to the petitioner's reputation and business standing.

2. That said application complied in every respect with the terms of the aforesaid oil lands leasing act, and with all rules and regulations of the Department of the Interior lawfully prescribed thereunder.

3. That said application was filed in petitioner's own interest, and was not filed in the interest of any other person or persons, association or corporation.

4. That all of the statements set forth in said application were true at the time of the filing thereof, and were also true at all other times herein mentioned, and are now true.

5. That petitioner paid to the respondents, by paying to said district land office, at the time of filing said application, the filing fee required by law.

4 6. That the land described in said application in respect of which petitioner desired said prospecting permit, which land is the same as that in respect of which Petitioner in this proceeding desires that a permit issue to prospect for oil and gas, is as follows:

All of section 31, township 24, south range 20 east, M. D. B. & M., consisting of 655.08 acres, more or less.

7. That said land described in paragraph 6 above is not covered by any prior existing claims, adverse to those of this petitioner, is not within the limits of a known geologic structure of a producing oil or gas field, and is subject in all respects to prospecting pursuant to the aforesaid oil lands leasing act.

8. That thereafter, on or about May 27, 1929, the register of said district land office, acting for the respondents herein, returned to petitioner his said application and filing fee, together with a letter of refusal to file said application, which said letter was in words and figures as follows, to wit:

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Sacramento, Calif., May 27, 1929.

H. H. SIMPSON,
463 I. W. Hellman Bldg., Los Angeles, Calif.

DEAR SIR: Reference is made to your application for oil and gas prospecting permit for all of section 31, T. 24 S., R. 20 E., M. D. M.

You are advised that by his order of March 20, 1929, Secretary of the Interior directed as follows;

"Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929 and will reject all pending applications for permits."

Accordingly, your application and post-office money order for $10.00, which was tendered in payment of fee, are returned herewith.

Yours very truly,

JOHN C. ING, *Register.*

"M
"2 incls.

9. Your petitioner is not now, nor at any of the times herein mentioned was he, the owner of or the holder of any permit to prospect for oil and gas upon any public lands of the United States of America, nor interested directly or indirectly in any such permit or application therefor, except as herein mentioned, nor a stockholder in any corporation holding such a permit or making any such application therefor.

10. That prior to the filing by petitioner of the application hereinbefore referred to, no subsisting permit had been granted covering any portion of the land therein described, and no other application concerning the same land, or any portion thereof, or concerning the permit requested by petitioner, was filed by any other person whatever, nor has any such application been filed or permit granted since said date.

11. That within the proper time, on or about May 31, 1929, petitioner filed an appeal in the local district land office of the Department of the Interior, at Sacramento, California, from the said action of the register in refusing to receive for filing petitioner's said oil and gas prospecting permit application. That said appeal was based upon the ground that there was no authority of law for the action taken by said register in refusing to accept said application. That the respondents, contrary to law and in abuse of any

discretion which they may have under law, denied the appeal of petitioner, and have refused, and now refuse, to consider the same.

6 12. That petitioner has complied with all of the provisions of the aforesaid oil lands leasing act, and any and all lawful regulations prescribed thereunder, and stands ready, willing, and able to pay all fees and do any and all acts and things required under the terms of said act, and to comply with any and all reasonable and lawful regulations prescribed thereunder. That respondents have each of them failed, neglected, and refused, and now fail and refuse to grant to your petitioner the permit applied for by him. That the sole reason given by respondents for so doing is the claim by respondents that under the aforesaid oil lands leasing act the granting of permits or licenses to prospect for oil or gas upon the public lands is discretionary with the Secretary of the Interior.

13. That petitioner, having complied with all provisions of law relevant thereto, and all reasonable regulations prescribed thereunder, is entitled, as a matter of law, to said permit. That no such discretion is given to the Secretary of the Interior under the terms of said oil lands leasing act, or any other law of the United States, and any regulation, order, or action purporting to assert that the Secretary of the Interior has such authority was and is void, and in violation of petitioner's rights under the Constitution and laws of the United States, and particularly under the terms of the said oil lands leasing act, and constitutes an erroneous interpretation of said oil lands leasing act.

14. By reason of said action of respondents in failing and refusing to grant the permit applied for by petitioner, your petitioner has been deprived of the rights accorded to him by law, and particularly by the terms of said oil lands leasing act, and the Constitution of the United States, to his great and irreparable damage.

15. That petitioner has no plain, speedy, or adequate remedy
7 in the ordinary course of law, for that there is no appeal provided by law from the decision of the Secretary of the Interior, and for that the issuance of the permit applied for by petitioner was and is enjoined upon the respondent Secretary by law and his duties with regard thereto are ministerial.

16. That the decision of this matter involves the interpretation of the aforesaid oil lands leasing act and the rights of citizens of the United States thereunder, and under the Constitution of the United States, and the rights and duties of the officials of the United States in connection therewith.

17. That no decision has yet been rendered in any of the courts of the United States upon the question herewith presented. That the rights of the citizens of the United States, and the duties of the officials of the United States in connection therewith are in doubt. That the questions involved herein are of great public moment, and are of great importance to the citizens of the United States.

18. That a speedy and final decision upon these questions is of vital necessity to the citizens of the United States, and the officials of the Government of the United States.

II. SECOND GROUND FOR WRIT

19. That on or about May 25, 1929, petitioner caused to be filed in the proper district land office of said Department of the Interior, located at Sacramento, California, an application (a copy of which is attached hereto, made a part hereof and marked "Exhibit B") for a permit to prospect for oil and gas upon certain land located in the State of California and within the territory of that district, setting forth (a) the name and address of your petitioner as the applicant therein; (b) proof by affidavit of your petitioner of his native-born citizenship in the United States of America and
8 his residence in the State of California; (c) a statement that the applicant was not the holder of, and had no direct or indirect interest in or to, any subsisting permit to prospect for minerals on lands of the United States, and had no other application pending for such a permit, and that he had no interest, either direct or indirect, in any other application for a permit, except for the parcels of land referred to in paragraph 6 of this petition; (d) a proper description of the land for which the permit was desired; (e) a statement that to the best of petitioner's knowledge and belief the land applied for was not within any known geological structure of a producing oil or gas field; and (f) containing at least three references as to petitioner's reputation and business standing.

20. That said application complied in every respect with the terms of the aforesaid oil lands leasing act and with all rules and regulations of the Department of the Interior lawfully prescribed thereunder.

21. That said application was filed in petitioner's own interest, and was not filed in the interest of any other person or persons, association or corporation.

22. That all of the statements set forth in said application were true at the time of the filing thereof, and were also true at all other times herein mentioned, and are now true.

23. That petitioner paid to respondents, by paying to said district land office, at the time of filing said application, the filing fee required by law.

24. That the land described in said application in respect of which the petitioner desired said prospecting permit, which land is the same as that in respect of which the petitioner in the second ground for writ in this proceding desires that a permit issue to prospect for oil and gas, is as follows:
9 Lots 9 and 10 section 30, east ½ of the southeast ¼ and northwest ¼ of the southeast ¼ section 19, township 27 south, range 19 east, M. D. M., consisting of 203.98 acres.

25. That said land described in paragraph 24 above is not covered by any prior existing claims, adverse to those of this petitioner, is not within the limits of a known geologic structure of a producing oil or gas field, and is subject in all respects to prospecting pursuant to the aforesaid oil lands leasing act.

26. That thereafter, on or about May 27, 1929, the Register of said District Land Office, acting for the respondents herein, returned

to petitioner his said application and filing fee, together with a letter of refusal to file said application, which said letter was in words and figures as follows, to-wit:

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Sacramento, California, May 27, 1929.

H. H. SIMPSON,
463 I. W. Hellman Bldg.,
Los Angeles, Calif.

DEAR SIR: Reference is made to your oil and gas permit application for portions of sections 19 and 30, T. 27 S., R. 19 E., M. D. M.

You are advised that by his order of March 20, 1929, the secretary of the Interior directed as follows:

"Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits."

Accordingly, your application and post office money order for $10.00, which was tendered in payment of fee, are returned herewith.

Yours very truly,

JOHN O. ING, *Register.*

M
2 incls.

27. That within the proper time, on or about May 31, 1929, petitioner filed an appeal in the local district land office of the Department of the Interior, at Sacramento, California, from the said action of the register in refusing to receive for filing petitioner's said oil and gas prospecting permit application. That said appeal was based upon the ground that there was no authority of law for the action taken by said register in refusing to accept said application. That the respondents, contrary to law and in abuse of any discretion which they may have under law, denied the appeal of petitioner, and have refused, and now refuse, to consider the same.

28. Petitioner realleges and reaffirms, with the same force and effect as though again set forth in full, all of the allegations contained in paragraphs 9, 10, 12, 13, 14, 15, 16, 17, and 18, of the first ground for writ hereinbefore set forth.

III. THIRD GROUND FOR WRIT

29. That on or about June 6, 1929, petitioner caused to be filed in the proper district land office of said Department of the Interior, located at Sacramento, California, an application (a copy of which is attached hereto, made a part hereof and marked "Exhibit C") for a permit to prospect for oil and gas upon certain land located in the State of California and within the territory of that District, setting forth (a) the name and address of your petitioner as the applicant therein; (b) proof by affidavit of your petitioner of his native-born citizenship in the United States of America and his residence in the State of California; (c) a statement that the applicant was not the holder of, and had no direct or indirect interest in or to, any subsisting permit to prospect for minerals on lands of the United States, and had no other application pend-

ing for such a permit, and that he had no interest, either direct or indirect in any other application for a permit, except for the parcels of land referred to in paragraphs 6 and 24 of this petition; (d) a proper description of the land for which the permit was desired; (e) a statement that to the best of petitioner's knowledge and belief the land applied for was not within any known geological structure of a producing oil or gas field; and (f) containing at least three references as to petitioner's reputation and business standing.

30. That said application complied in every respect with the terms of the aforesaid oil lands leasing act, and with all rules and regulations of the Department of the Interior lawfully prescribed thereunder.

31. That said application was filed in petitioner's own interest, and was not filed in the interest of any other person or persons, association or corporation.

32. That all of the statements set forth in said application were true at the time of the filing thereof, and were also true at all other times herein mentioned, and are now true.

33. That petitioner paid to respondents, by paying to said district land office, at the time of filing said application, the filing fee required by law.

34. That the land described in said application in respect of which the petitioner desired said prospecting permit, which land is the same as that in respect of which the petitioner in the third ground for writ in this proceeding desires that a permit issue to prospect for oil and gas, is as follows:

12 North ½, north ½ of the south ½ section 22; northeast ¼ section 14; southeast ¼ section 12; northwest ¼, west ½ of the east ½ section 18; southwest ¼ section 20; northwest ¼ of the northeast ¼, northwest ¼; north ½ of the southwest ¼, southwest ¼ of the southwest ¼ section 32, township 23 south, range 17 east, M. D. B. & M. All of section 14, township 23 south, range 16 east, M. D. B. & M., containing 2,240 acres more or less.

35. That said land described in paragraph 34 above is not covered by any prior existing claims, adverse to those of this petitioner, is not within the limits of a known geologic structure of a producing oil or gas field, and is subject in all respects to prospecting pursuant to the aforesaid oil lands leasing act.

36. That thereafter, on or about June 7, 1929, the register of said district land office, acting for the respondents herein, returned to petitioner his said application and filing fee, together with a letter of refusal to file said application, which said letter was in words and figures as follows, to wit:

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Sacramento, Calif., June 7, 1929.

H. H. SIMPSON,
463 I. W. Hellman Bldg., Los Angeles, Calif.

DEAR SIR: Reference is made to your application for oil and gas prospecting permit for portions of sections 12, 14, 18, 20, 22, and 32, T. 23 S., R. 17 E. and all of sec. 14, T. 23 S., R. 16 E., M. D. M.

You are advised that by order of March 20, 1929, the Secretary of the Interior directed as follows—

"Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits."

13 Accordingly, your application and cashier's check for $28.00, which was received with the application, are returned herewith.

Yours very truly,

EDW. C. JENNINGS,
Acting Register.

M
2 incls.

37. That within the proper time, on or about June 14, 1929, petitioner filed an appeal in the local district land office of the Department of the Interior, at Sacramento, California, from the said action of the register in refusing to receive for filing petitioner's said oil and gas prospecting permit application. That said appeal was based upon the ground that there was no authority of law for the action taken by said register in refusing to accept said application. That the respondents, contrary to law and in abuse of any discretion which they may have under law, denied the appeal of petitioner, and have refused, and now refuse, to consider the same.

38. Petitioner realleges and reaffirms, with the same force and effect as though again set forth in full, all of the allegations contained in paragraphs 9, 10, 12, 13, 14, 15, 16, 17, and 18 of the first ground for writ hereinbefore set forth.

Wherefore, the premises considered, the petitioner prays:

1. That a rule may issue out of this court directing the respondents, and each of them, to appear before this honorable court and show cause, if there be any, why a writ of mandamus should not be issued commanding and directing the respondents—

(a) To revoke said order of March 20, 1929, in so far as said order forbids the register of the United States Land Office to receive

14 applications for prospecting permits tendered by this petitioner; to direct the receiver to receive petitioner's permit applications as of the dates when said applications were tendered, and to transmit said applications to the Commissioner of the General Land Office, and to direct that the said commissioner and the said Secretary of the Interior take up and act upon said applications in due course, in accordance with the aforesaid oil lands leasing act.

(b) To grant your petitioner's application for, and issue to him a permit, under and pursuant to the aforesaid oil lands leasing act, to prospect for oil and gas upon the land described in paragraph 6 of this petition.

(c) To grant your petitioner's application for, and issue to him a permit, under and pursuant to the aforesaid oil lands leasing act, to prospect for oil and gas upon the land described in paragraph 24 of this petition.

(d) To grant you petitioner's application for, and issue to him a permit, under and pursuant to the aforesaid oil lands leasing act, to prospect for oil and gas upon the land described in paragraph 34 of this petition.

2. That a writ of mandamus may issue to said respondents, and each of them, commanding and directing them and each of them—

(a) To revoke said order of March 20, 1929, in so far as said order forbids the register of the United States Land Office to receive applications for prospecting permits tendered by this petitioner; to direct the receiver to receive petitioner's permit
15 applications as of the dates when said applications were tendered, and to transmit said applications to the Commissioner of the General Land Office, and to direct that the said commissioner and the said Secretary of the Interior take up and act upon said applications in due course, in accordance with the aforesaid oil lands leasing act.

(b) To grant your petitioner's application for and issue to him a permit, under and pursuant to the aforesaid oil lands leasing act, to prospect for oil and gas upon the land described in paragraph 6 of this petition.

(c) To grant your petitioner's application for, and issue to him a permit, under and pursuant to the aforesaid oil lands leasing act, to prospect for oil and gas upon the land described in paragraph 24 of this petition.

(d) To grant your petitioner's application for, and issue to him a permit, under and pursuant to the aforesaid oil lands leasing act, to prospect for oil and gas upon the land described in paragraph 34 of this petition.

3. For such other and further relief as the nature of this petition may require.

(Sgd.) HOMER HENDRICKS,
(Sgd.) RAYMOND L. HAIGHT,
Attorneys for Petitioner.

16 DISTRICT OF COLUMBIA,
City of Washington, ss:

Homer Hendricks, being duly sworn, says that he is one of the attorneys for H. H. Simpson, the petitioner above named; that said petitioner is absent from the District of Columbia; that affiant has read the foregoing petition and knows the contents thereof and that he verily believes the matters and facts stated therein are true.

(Sgd.) HOMER HENDRICKS.

Subscribed and sworn to before me this 20th day of February, 1930.

[SEAL.] (Sgd.) FREDERICK G. UMHAU,
Notary Public.

My commission expires Nov. 15, 1930.

17 "*Exhibit A*"

APPLICATION FOR PROSPECTING PERMIT

OIL AND GAS

(Act of Congress approved Feb. 25, 1920)

UNITED STATES LAND OFFICE.

To the honorable Commissioner of the General Land Office, Washington, D. C.

H. H. Simpson, whose post-office address is 463 I. W. Hellman Building, Los Angeles, Cal., being first duly sworn upon oath,

deposes and says: That he is the applicant herein, and that his post-office address is as stated above; that he is a native-born citizen of the United States over the age of 21 years.

That he is not the holder of, and has no direct or indirect interest in, any other subsisting permit and has no other application pending for a permit, nor has he any interest either direct or indirect, in any other application for a permit except:

That this application is filed in his own interest and not in the interest of any other person, or persons, association or corporation.

That the description of the land for which this applicant for a prospecting permit applies for under the act of February 25, 1920 (Public 146), is as follows:

All of section 31, township 24 south, range 20 east, M. D. B. & M. consisting of 655.08 acres, more or less.

That the land above described is not included in any forest, military, naval, or Indian reservation.

That applicant believes that the above-described land offers a favorable field for prospecting for oil and gas for the reason that the report made by geologists to applicant indicate there is a possibility of finding oil and gas within the limits of same.

Affiant further states that to the best of his knowledge and belief the land applied for is not within any known geological structure of a producing oil or gas field.

That the applicant's proposed method of conducting exploratory operations is the construction of a camp to properly house employees, the building of roads, the erection of a standard rig, the installation of heavy drilling machinery, and the doing of all things necessary in drilling an oil and gas well.

18 Applicant further states that he has sufficient capital available for such operations, and if the permit to prospect is granted, applicant expects to proceed with the drilling in compliance with the requirements of the permit.

Applicant states that while he has had no personal experience in operations of this nature, he expects to employ experts in operating said work.

For reference to the applicant's reputation and business standing he respectfully refers to:

T. G. Kennedy, 314 South Olive St., Los Angeles, Cal.; Fred W. Armstrong, 7101 Cimarron St., Los Angeles, Cal.; John T. Kelley, 2705 Temple St., Los Angeles, Cal.

Wherefore, the applicant herein requests that such permit under said act do issue.

The address to which the applicant desires all notices sent is 463 I. W. Hellman Bldg., Los Angeles, Cal.

(Sgd.) H. H. SIMPSON.

Subscribed and sworn to before me this 25th day of May, A. D. 1929.

[SEAL.] (Sgd.) W. J. CROSBY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 27, 1930.

19

"*Exhibit B*"

APPLICATION FOR PROSPECTING PERMIT, OIL AND GAS

(Act of Congress approved Feb. 25, 1920)

UNITED STATES LAND OFFICE.

To the Honorable Commissioner of the General Land Office, Washington, D. C.:

H. H. Simpson, whose post-office address is 463 I. W. Hellman Bldg., Los Angeles, Cal., being first duly sworn upon oath, deposes and says: That he is the applicant herein, and that his post-office address is as stated above; that he is a native-born citizen of the United States over the age of 21 years.

That he is not the holder of, and has no direct or indirect interest in, any other subsisting permit and has no other application pending for a permit, nor has he any interest, either direct or indirect, in any other application for a permit, except:

Section 31, T. 24 S., R. 20 E., M. D. B. & M.

That this application is filed in his own interest and not in the interest of any other person, or persons, association or corporation.

That the description of the land for which this applicant for a prospecting permit applies for under the act of February 25, 1920 (Public 146), is as follows:

Lots 9 and 10, section 30, east ½ of the southeast ¼ and northwest ¼ of the southeast ¼, section 19, township 27 south, range 19 east, M. D. M., consisting of 203.98 acres.

That the land above described is not included in any forest, military, naval, or Indian reservation.

That applicant believes that the above-described land offers a favorable field for prospecting for oil and gas for the reason that the reports made by geologists to applicant indicate there is a possibility of finding oil and gas within the limits of same.

Affiant further states that to the best of his knowledge and belief the land applied for is not within any known geological structure of a producing oil or gas field.

That the applicant's proposed method of conducting exploratory operations is the construction of a camp to properly house employees, the building of roads, the erection of a standard rig, the installation of heavy drilling machinery, and the doing of all things necessary in drilling an oil and gas well.

20 Applicant further states that he has sufficient capital available for such operations, and if the permit to prospect is granted, applicant expects to proceed with the drilling in compliance with the requirements of the permit.

Applicant states that while he has had no personal experience in operations of this nature, he expects to employ experts in operating said work.

For reference to the applicant's reputation and business standing he respectfully refers to:

T. H. Kennedy, 314 South Olive St., Los Angeles, Cal.

Fred W. Armstrong, 7101 Cimarron St., Los Angeles, Cal.

John T. Kelley, 2705 Temple St., Los Angeles, Cal.

Wherefore, the applicant herein requests that such permit under said act do issue.

The address to which the applicant desires all notices sent is 463 I. W. Hellman Bldg., Los Angeles, Cal.

(Sgd) H. H. SIMPSON.

Subscribed and sworn to before me this 25th day of May A. D. 1929.

[SEAL.] (Sgd) W. J. CROSBY,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 27, 1930.

21 *"Exhibit C"*

APPLICATION FOR PROSPECTING PERMIT OIL AND GAS

(Act of Congress approved Feb. 25, 1920)

UNITED STATES LAND OFFICE.

To the honorable Commissioner of the General Land Office, Washington, D. C.

H. H. Simpson, whose post office address is 463 I. W. Hellman Bldg., Los Angeles, Cal., being first duly sworn upon oath, deposes and says: That he is the applicant herein, and that his post office address is as stated above; that he is a native born citizen of the United States over the age of 21 years.

That he is not the holder of, and has no direct or indirect interest in, any other subsisting permit and has no other application pending for a permit, nor has he any interest, either direct or indirect, in any other application for a permit, except: Pending permits covering parcels in sec. 19 & 30, T. 27 S., R. 19 E., M. D. M., & all of sec. 31, T. 24 S., R. 20 E., M. D. M.

That this application is filed in his own interest and not in the interest of any other person, or persons, association or corporation.

That the description of the land for which this applicant for a prospecting permit applies for under the act of February 25, 1920 (Public 146), is as follows:

North ½, north ½ of the south ½, section 22; northeast ¼, section 14; southeast ¼, section 12; northwest ¼, west ½ of the east ½, section 18; southwest ¼ section 20; northwest ¼ of the northeast ¼, northwest ¼; north ½ of the southwest ¼, southwest ¼ of the southwest ¼, Section 32, Township 23 south, range 17 east, M. D. B. & M. All of section 14, Township 23 south, range 16 east, M. D. B. & M., containing 2,240 acres, more or less.

That the land above described is not included in any forest, military, naval, or Indian reservation.

That applicant believes that the above-described land offers a favorable field for prospecting for oil and gas for the reason that the reports made by geologists to applicant indicate there is a possibility of finding oil and gas within the limits of same.

Affiant further states that to the best of his knowledge and belief the land applied for is not within and known geological structure of a producing oil or gas field.

That the applicant's proposed method of conducting explor-
22 atory operations is the construction of a camp to properly house employees, the building of roads, the erection of a standard rig, the installation of heavy drilling machinery, and the doing of all things necessary in drilling an oil and gas well.

Applicant further states that he has sufficient capital available for such operations, and if the permit to prospect is granted, applicant expects to proceed with the drilling in compliance with the requirements of the permit.

Applicant states that while he has had no personal experience in operations of this nature, he expects to employ experts in operating said work.

For reference to the applicant's reputation and business standing he respectfully refers to:

John T. Kelley, 2705 Temple St., Los Angeles, Cal.
F. W. Armstrong, 463 I. W. Hellman Bldg., Los Angeles, Cal.
A. E. Perris, 602 Pantages Theatre Bldg., Los Angeles, Cal.

Wherefore, the applicant herein requests that such permit under said act do issue.

The address to which the applicant desires all notices sent is 463 I. W. Hellman Bldg., Los Angeles, Cal.

(Signed) H. H. SIMPSON.

Subscribed and sworn to before me this 6th day of June A. D., 1929.

[SEAL.] (Signed) F. B. DICKEY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Oct. 1, 1932.

23 In the Supreme Court of the District of Columbia

UNITED STATES OF AMERICA EX REL. H. H. Simpson, 463 I. W. Hellman Building, Los Angeles, California, petitioner v. RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office, respondents	At law No. 77788.

Answer and response to the rule

Filed Mar. 1, 1930

Come now Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, and each in response to the rule to show cause and for their separate answer to the allegations of the petition say that for the purposes of this suit they admit all of the statements or allegations made by the petitioner preliminary to the numbered allegations of their petition, and for answer to such numbered allegations, and in response to the rule to show cause, say:

1. They admit the allegations of paragraph 1.

2. For the purposes of this suit only they admit the allegations of paragraph 2.

3. For the purposes of this suit only they admit the allegations of paragraph 3.

4. The respondents say for answer to paragraph four that neither of them made any special examination of the facts set forth in petitioner's application and hence are unable to either affirm or deny the existence or nonexistence of the facts as set forth therein. For the purpose of joining issue thereon, they deny each and every allegation of said paragraph.

24 5. Respondents admit that petitioner tendered to the district land office the filing fee required by law, but state that such filing fee was returned to the petitioner and was not accepted by them or any of their subordinates.

6. They admit the allegations of paragraph 6.

7. In answer to paragraph 7, the respondents state that inasmuch as they made no separate examination of the facts relative to the condition of the lands described in petitioner's application, or relative to the status of the petitioner, they are unable to either affirm or deny the allegations of paragraph 7, but for the purposes of this suit only they deny such allegations.

8. They admit the allegations of paragraph 8.

9. Respondents state that inasmuch as they made no separate examination of the facts relative to the status of the petitioner as set forth in paragraph 9, the respondents are unable either to affirm or deny the allegations thereof. However, for the purposes of this suit only they admit said allegations.

10. Respondents admit the allegations of paragraph 10.

11. Answering the allegations of paragraph 11, respondents deny that the action of the Secretary of the Interior, in connection with the application of petitioner, was contrary to law and in abuse of his discretion as such official. They admit all other allegations of said paragraph.

12. They deny each and every allegation in paragraph 12.

13. The respondents deny that the petitioner is entitled to a permit to prospect the lands described in his application for oil and gas. They state that all of the allegations of section 13 are argumentative and constitute conclusions of law on the part of the pleader, which respondents are advised and understand they are under no obligations either to affirm or deny.

25 14. They deny the allegations of paragraph 14.

15. They deny the allegations of paragraph 15.

16. They deny the allegations of paragraph 16, and allege that the court has no jurisdiction in the premises to award to petitioners the relief sought, the administration thereof having been reposed by law in the Secretary of the Interior, whose action is final and conclusive.

17. Respondents admit that no published decisions of the United States courts exist which involve the question raised by this petition, if any is raised. They deny all other allegations of said paragraph.

18. The respondents admit that a speedy and final decision in this case is desirable, both to petitioner and to respondents.

ANSWER AND RESPONSE TO SECOND GROUND

19. The respondents admit the allegations of paragraph 19.

20. They admit the allegations of paragraph 20.

21. So far as their knowledge goes, they admit the allegations of paragraph 21.

22. In view of the fact that no particular examination was made by respondents as to the separate statements set forth in said application, they are unable to state as a matter of official knowledge whether or not such statements were true at the time of filing thereof, and all other times mentioned therein, or are now true.

23. Respondents admit that petitioner tendered to the district land office the filing fee required by law, but state that such filing fee was returned to the petitioner and was not accepted by them or any of their subordinates.

24. They admit the allegations of paragraph 24.

25. In answer to paragraph 25, the respondents state that inasmuch as they made no separate examination of the facts relative to the condition of the lands described in petitioner's applica-
26. tion, or relative to the status of the petitioner, they are unable to either affirm or deny the allegations of paragraph 25, but for the purposes of this suit only they deny such allegations.

26. They admit the allegations of paragraph 26.

27. Answering the allegations of paragraph 27, respondents deny that, in denying the appeal of the petitioner and in refusing to consider the same, such action was contrary to law and in the abuse of any official discretion vested in them under the law. All other allegations thereof they admit.

28. Respondents state that no answer seems necessary to the allegations of paragraph 28. They have separately answered each of the paragraphs enumerated therein and in answer to said paragraph 28, if any answer is required from them, they reallege, reaffirm, and restate with the same force and effect as though again set forth in full all of the allegations contained in each of said enumerated paragraphs, to wit, 9, 10, 12, 13, 14, 15, 16, 17, and 18, in answer to the first ground for writ hereinbefore set forth.

ANSWER AND RESPONSE TO THIRD GROUND

29. The respondents admit the allegations of paragraph 29.

30. For the purposes of this suit only they admit the allegations of paragraph 30.

31. For the purposes of this suit only they admit the allegations of paragraph 31.

32. The respondents say for answer to paragraph 32 that neither of them made any special examination of the facts set forth in petitioner's application and hence are unable to either affirm or deny the existence or nonexistence of the facts as set forth therein. For the purpose of adjoining issue thereon, they deny each and every allegation of said paragraph.

27 33. Respondents admit that petitioner tendered to the district land office the filing fee required by law, but state that

such filing fee was returned to the petitioner and was not accepted by them or any of their subordinates,

34. They admit the allegations of paragraph 34.

35. In answer to paragraph 35, the respondents state that inasmuch as they made no separate examination of the facts relative to the condition of the lands described in petitioner's application, or relative to the status of the petitioner, they are unable to either affirm or deny the allegations of paragraph 35, but for the purposes of this suit only they deny such allegations.

36. They admit the allegation of paragraph 36.

37. Answering the allegations of paragraph 37, respondents deny that the action of the Secretary of the Interior, in connection with the application of petitioner, was contrary to law and in abuse of his discretion as such official. They admit all other allegations of said paragraph.

38. Respondents state that no answer seems necessary to the allegations of paragraph 38. They have separately answered each of the paragraphs enumerated therein and in answer to said paragraph 38, if any answer is required from them, they reallege, reaffirm, and restate with the same force and effect as though again set forth in full all of the allegations contained in each of said enumerated paragraphs, to wit, 9, 10, 12, 13, 14, 15, 16, 17, and 18, in answer to the first ground for writ hereinbefore set forth.

39. Further answering all of the allegations of said petition, including the allegations of the first, second, and third grounds thereof, respondents allege that the administration of the act of February 25, 1920 (41 Stat. 437, section 32), is reposed in the
28 Secretary of the Interior, with whose authority, reasonably exercised, the courts may not interfere unless the Secretary fails, refuses, or neglects to perform a mandatory, ministerial duty imposed by the terms of the act.

40. Further answering all of the allegations of said petition, including the allegations of the first, second and third grounds thereof respondents allege that the language of section 13 of the act is permissive, not mandatory, and has been so construed and acted upon by the Secretary of the Interior during the nine years intervening since the date of its passage. Its context plainly reposes in the Secretary of the Interior the discretion either to issue or decline to issue prospecting permits. Neither section 13 nor any other section, nor any rule or regulation promulgated in the administration of the act, vests any right in an applicant for a permit, to receive the same. On the contrary, section 2 of the regulations issued March 11, 1920, by the Secretary of the Interior under said act of February 25, 1920, reprinted and reissued by the Secretary of the Interior October 29, 1920, in force at date of petitioner's application, and still in force, expressly provides:

It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant.

The securing of a permit or license to prospect public lands for oil and gas is a privilege and not a right. Petitioner does not allege

that he had performed any work or expended any money or other thing of value in, upon or for the development of the land described in the application, nor that he had surrendered to the United States any claim, right or interest in this or other lands of the United States which would constitute a legal or equitable claim or right to receive a permit; neither does he disclose that any right, of whatsoever nature, has been acquired by him to receive a permit, but he
29 simply sets forth a state of facts which indicate that he is qualified as an applicant and has thus placed himself in a position to apply for and receive a permit if and when issued by the Secretary of the Interior. Further than that, he shows no acquired status involving fixed or vested rights to enter public land of the United States.

41. Further answering all of the allegations of said petition, including the allegations of the first, second and third grounds thereof respondents allege that the informal proclamation by the President of the United States, through the press, on March 12, 1929, referred to in the petition that "there will be complete conservation of Government oil in this administration" was the public announcement of the definite policy of the administration to assist in maintaining, or restoring, the equilibrium of the oil markets of the country. Thereupon the Secretary of the Interior, as appears by the petition, took immediate steps to put such policy into actual operation. The effect of his Orders Nos. 337, dated March 16, 1929, and 338, dated March 20, 1929, copies of which are attached hereto and made a part hereof, was to cause all public lands containing oil to be temporarily withdrawn from all exploration for oil and gas under the act of February 25, 1920, and thus for such period as may be required, in the discretion of the President, prevent Government-owned oil from entering the market in competition with privately owned oil. The acts of the Secretary of the Interior in effectuating the aforesaid policy of the President, of which complaint is made by the petitioner, are in direct response to the presidential request. Such acts and orders were done and issued in the valid exercise of his general supervision over the public lands of the United States, and are as much within the purview of his official duty as if made the specific subject of a formal request in writing directed to him under the presidential signature and seal. Such action is wholly execu-
30 tive in character, results from the due exercise of executive judgment and discretion, is the act of the President, both in law and fact under these circumstances, and the courts are without power to review, reverse, modify, or otherwise interfere therewith. The petition therefore states no ground upon which the court will be justified in issuing the writ sought.

Wherefore, respondents, and each of them, pray that the rule be discharged as to each of them, the petition dismissed as to each of them, and that petitioner take nothing herein; that respondents and each of them be permitted to go hence without day, with their costs.

RAY LYMAN WILBUR,
Secretary of the Interior.
C. C. MOORE,
Commissioner of the General Land Office.

31 DISTRICT OF COLUMBIA, *ss:*

Ray Lyman Wilbur, being first duly sworn, on his oath says that he has read the foregoing answer by him subscribed, and that he knows the contents thereof, and that the matters therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true.

RAY LYMAN WILBUR.

Subscribed and sworn to before me this 28th day of February, 1930.

[NOTARIAL SEAL.] W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

DISTRICT OF COLUMBIA, *ss:*

Charles C. Moore, being first duly sworn, on his oath says that he has read the foregoing answer by him subscribed, and that he knows the contents thereof, and that the matters therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true.

CHARLES C. MOORE.

Subscribed and sworn to before me this 27th day of February, 1930.

[NOTARIAL SEAL.] HERMAN C. GAUSS,
Notary Public in and for the District of Columbia.
Commission expires May 18, 1933.

E. C. FINNEY,
Solicitor, Department of the Interior,
O. H. GRAVES,
Assistant to the Solicitor,
Attorneys for Respondents.

32 UNITED STATES DEPARTMENT OF THE INTERIOR,
Washington, March 16, 1929.

ORDER NO. 337.

The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.

Probably in none of the cases on hand has the applicant expended money for developmental purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.

Where land covered by pending applications is likely to be drained by adjoining wells on privately-owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.

With regard to the 20,000 outstanding permits on public lands, the Department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be

given to carry on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations.

Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.

(Signed) RAY LYMAN WILBUR,
Secretary.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Washington, March 20, 1929.

ORDER No. 338.

The following outlines the general procedure in the Department of the Interior for executing the President's public land oil conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area; under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to

lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to determine whether permittees have acquired equities which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

35 9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights, or questions of similar character, they should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy; otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing wildcatting fields where a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration.

13. Permits issued and outstanding in Executive Order Indian Reservations under the act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.

36 *Demurrer*

Filed Mar. 7, 1930

* * * * * * *

Comes now the petitioner, by his undersigned attorneys, in the above entitled and numbered cause, and says that the respondent's answer and response to the rule is bad in substance.

The matters of law intended to be argued on the hearing of this demurrer are as follows:

1. The act of February 25, 1920 (41 Stat. 437, ch. 85) relied upon by respondents does not vest said respondents with judgment and discretion to refuse to consider upon their merits applications of your petitioner for permits to prospect for oil and gas upon the lands described in said applications.

2. The certain orders, instructions, public announcements and other expressions by the president and these respondents, referred to in the answer, do not constitute, in law or in fact, withdrawals of the lands, described in petitioner's permit applications from the open and unappropriated public domain, or render them not subject to disposal under the act of February 25, 1920. (41 Stat. 437, ch. 85.)

3. The authority of the president to make withdrawals of public lands is granted and limited by the Act of Congress, approved June 25, 1910 (36 Stat. 847, ch. 421), and proceedings which do not conform to this statute are not in law, or in fact, withdrawals.

37 4. Neither the President nor these respondents possess any power to deal with the public lands under a policy formulated by them, but must execute the policies expressed by the Congress with respect thereto.

5. The President and respondents have no authority inherent in their offices, or under any statute to withhold public lands from disposal as part of a program designed to benefit the oil industry, which is private business, and the orders issued which have such effect are ultra vires and void.

6. Other matters of law, apparent upon the face of the pleadings.

HOMER HENDRICKS,
DONALD V. HUNTER,
Both of Miller & Chevalier,
RAYMOND L. HAIGHT,
Of Haight, Mathes & Shepard,
Attorneys for Petitioner.

38 *Memorandum opinion*

Filed Apr. 10, 1930

* * * * * * *

Upon the grounds stated in my memorandum opinion filed April 8th, 1930, in the case of U. S. ex rel. Vedder, the demurrer to the answer will be sustained.

BAILEY, *J.*

Supreme Court of the District of Columbia

Wednesday, April 16th, 1930

Session resumed pursuant to adjournment, Hon. Jennings Bailey, justice, presiding.

* * * * * * *

This cause came on heretofore to be heard upon the petition filed, the rule to show cause issued, the answer of respondents and the demurrer filed herein to said answer and after argument by attorneys of record for the respective parties was submitted to the court. Thereupon, the same being considered, it is ordered that the demurrer be, and the same is hereby, sustained.

The respondents by their said attorneys elect to stand upon their answer and it is ordered that judgment be now entered.

Wherefore, it is adjudged and ordered that a writ of mandamus do forthwith issue in this cause to the Secretary of the Interior, requiring him to accept for filing the applications of the peti-
39 tioner H. H. Simpson, specified in this cause, directing him to proceed therewith according to law.

Further, it is considered that petitioner recover of respondents his costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment the respondents by their said attorneys, in open court, note an appeal to the Court of Appeals of the District of Columbia.

40 In the Supreme Court of the District of Columbia

UNITED STATES OF AMERICA, EX RELATIONE, H. H. Simpson, petitioner v. RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office, respondents	At law No. 77788

Assignment of errors

Filed Apr. 19, 1930

* * * * * * *

The respondents present their assignment of errors as follows:

1. The court erred in sustaining the demurrer to the answer.

2. The court erred in finding for the petitioner and against the respondents and in granting the writ of mandamus herein.

3. The court erred in holding that the acts of the President of the United States and of the Secretary of the Interior in the premises, together, or separately, do not constitute a temporary executive withdrawal of the public lands subject to prospecting for oil and gas under the provisions of the act of February 25, 1920, commonly called the oil leasing act, from the purposes of said act.

4. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to

permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant.

401½ 5. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant in the absence of specific rules and regulations.

6. The court erred in holding that the provisions of the last subdivision of rule 2 of the rules and regulations do not vest in the Secretary of the Interior discretion to refuse to grant any permit in the due exercise of his official duty.

O. H. GRAVES,
Attorney for Respondents.

41 In the Supreme Court of the District of Columbia

UNITED STATES OF AMERICA EX RELATIONE H. H. Simpson, petitioner v. RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office, respondents	At law No. 77788

Designation of record

Filed Apr. 19, 1930

* * * * * * *

The clerk, in making up the transcript of record on appeal in the above-entitled cause, will include:

1. Petition and exhibits.
2. Answer and exhibits.
3. Demurrer to answer.
4. Order sustaining the demurrer and judgment of the court.
5. Notation and allowing of appeal.
6. Assignment of errors.
7. This designation.

O. H. GRAVES,
Attorney for Respondents.

Service acknowledged this 14th day of April, 1930.
HOMER HENDRICKS,
Attorney for Petitioner.

42 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 41, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No, 77788 at Law,

wherein United States of America, *ex rel* H. H. Simpson is petitioner and Ray Lyman Wilbur, Secretary of the Interior and Charles C. Moore, Commissioner of the General Land Office, are respondents, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 21st day of June, 1930.

[SEAL.] FRANK E. CUNNINGHAM, *Clerk.*

(Indorsement on cover:) District of Columbia Supreme Court. No. 5251. Ray Lyman Wilbur, Secretary &c., et al., appellants, vs. United States of America, ex rel., H. H. Simpson. Court of Appeals, District of Columbia. Filed June 24, 1930. Henry W. Hodges, clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Tuesday, October 14th, A. D. 1930.

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

vs.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

vs.

THE UNITED STATES of AMERICA ex Relatione ETHEL McLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

vs.

W. B. PYRON

and No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. Moore, Commissioner of the General Land Office, Appellants,

vs.

UNITED STATES of AMERICA ex Rel. H. H. SIMPSON

On motion, William O. Wilson, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of the State of Wyoming.

On motion, P. Q. Nyce, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of Utah, New Mexico and Montana.

The argument in the above entitled cause was commenced by Mr. O. H. Graves, attorney for the appellants, and was continued by Mr. E. C. Finney, attorney for the appellants.

Wednesday, October 15th, A. D. 1930.

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

vs.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

vs.

THE UNITED STATES of AMERICA ex Relatione ETHEL McLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

vs.

W. B. PYRON

and No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. Moore, Commissioner of the General Land Office, Appellants,

vs.

UNITED STATES of AMERICA ex Rel. H. H. SIMPSON

The argument in the above entitled causes was continued by Mr. James Conlon, attorney for the appellant in No.

5241, and by Mr. Lewis E. Hoffman, attorney for the appellant in No. 5247, and by Mr. James G. Leovy, attorney for the appellant in No. 5250, and by William O. Wilson, Esq., Attorney General of the State of Wyoming, as amicus curiæ, and by Mr. Peter Q. Nyce, as amicus curiæ, on behalf of New Mexico, Utah and Montana, and by Mr. Chester I. Long, as amicus curiæ, on behalf of the State of Colorado, and was concluded by Mr. E. C. Finney, attorney for the appellants.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

and No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYRON

and No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

These cases were argued and presented with No. 5241, Wilbur v. Barton, just decided, and the decision in that case is controlling here.

The judgment in each case will be reversed, and the cause remanded.

Reversed.

Chas. H. Robb, Associate Justice.

For reasons stated in his dissenting opinion in No. 5241, Wilbur v. Barton, Mr. Justice Van Orsdel dissents.

Endorsed: Nos. 5247, 5250, 5251. Ray Lyman Wilbur, Secretary of the Interior, Appellant, v. United States of America ex relatione Ethel M. McLennan; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellants, v. W. B. Pyron; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellants, v. United States of America ex rel. H. H. Simpson. Opinion of the Court per Mr. Justice Robb. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Monday, December 1st, A. D. 1930.

* * * * * * *

No. 5251, October Term, 1930

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

vs.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said Supreme Court

for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Robb, December 1, 1930.

Mr. Justice Van Orsdel dissenting.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5241

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Rel. ROY G. BARTON

Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

Appeal from a judgment in the Supreme Court of the District directing the issuance of a writ of mandamus to compel the Secretary of the Interior "to reinstate the application of the petitioner, Roy G. Barton, * * * and to proceed thereon according to law."

Should the judgment be affirmed, it probably would result in the reinstatement of "more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices."

The cause was heard on petition and answer. There is no dispute as to the facts, which are substantially as follows: On June 6, 1928, Barton filed an application in the Land Office at Las Cruces, New Mexico, for a permit to prospect for oil and gas in a certain described tract of public land of the United States (Act of February 25, 1920; 41 Stat. 437).

On March 13, 1929, the Department of the Interior released a "Memorandum for the Press", reading in part as follows: "Secretary Wilbur, of the Department of the Interior, today asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public

domain, and to reject all applications now pending. These instructions are in accordance with the statement issued at the White House yesterday to the effect that 'there will be a complete conservation of Government oil in this administration.'"

On the same day a telegram was forwarded by the Department to the various United States land offices, including the land office at Las Cruces, New Mexico, reading in part as follows: "No oil and gas prospecting permits will be issued on and after March 12, 1929. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked."

On March 16, 1929, Departmental Order No. 337 was issued, reading in part as follows: "The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department. There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications. Probably in none of the cases on hand has the applicant expended money for development purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application. * * * To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations. Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. * * * No leases will be issued for oil and gas production unless required by mandate of law, such as

discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929." This Order also was incorporated in a "Memorandum for the Press" issued by the Department on the same day.

On March 26, 1929, the Commissioner of the General Land Office, "pursuant to instructions approved by the Secretary of the Interior March 13, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929, rejected" Barton's application. An appeal was taken, and the order of rejection was sustained by the Department in a decision dated September 4, 1929.

In his petition Barton avers "that there is nothing in or under the provisions of the act of February 25, 1920 (41 Stat. 437), * * * which requires your relator to make any substantial expenditures for reliable geological surveys upon the lands embraced in his oil and gas application * * * in order to entitle him to a permit for the lands described in said application;" and that "the Secretary of the Interior is without authority of law to reject his application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted, and March 16, 1929, also identified as Departmental Order No. 337."

The answer admits, for the purposes of this suit, that Barton "was duly qualified under the law to receive the permit for which he applied; that at all times relator (Barton) was and is now ready, able, and willing to comply with all regulations made pursuant to the said act of Congress respecting the duties and obligations of permittee."

Did the orders of the Secretary of the Interior amount to a temporary withdrawal of the public land from location, entry, and exploration for the purpose of discovering oil or gas; and, assuming the withdrawal, did the mere filing of an application for a prospecting permit initiate a right in the applicant that could not be affected by the withdrawal?

The Act of June 25, 1910 (36 Stat. 847), "to authorize the President of the United States to make withdrawals of public lands in certain cases," reads in parts as follows: "Be it enacted * * *, That the President may at any

time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Prior to 1910 the President had acted in scores of cases without express statutory authority, and in United States v. Midwest Oil Co., 236 U. S. 459, his authority to make such withdrawals was expressly sustained.

There can be no doubt that the effect of the orders issued by the Secretary was to withdraw from further location, entry, and exploration for the discovery of oil and gas all public land, and that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest. That such was the intent of the Secretary and the understanding of the public is equally plain. It is immaterial that the orders were not limited as to time, for the Act of 1910 provides that such withdrawals or reservations shall remain in force until revoked by the President or by an Act of Congress.

The next question to be determined is whether the withdrawal of the Secretary was the withdrawal of the President. It is settled law that "the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties" (Wilcox v. Jackson, 13 Pet. 498), and that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President" (Wolsey v. Chapman, 101 U. S. 755, 769). In the case last mentioned it was held that the order of the Secretary of the Interior, directing that the lands on the Des Moines River above the Racoon Fork be reserved from sale, was in contemplation of law the order of the President and had the same effect as the proclamation mentioned in the Act of September 4, 1841 (5 Stat. 453). The Court said: "A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in

this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we can not doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act." See also United States v. Morrison, 240 U. S. 192; Northern Pacific Railway Co. v. Wismer, 246 U. S. 283; Relation of the President to the Executive Departments, 7 Op. Atty. Gen. 453.

In the present case the orders of the Secretary gave effect to the previously announced policy of the President, were acquiesced in by him, and were in legal contemplation his acts. Was the President vested with such authority?

It is not contended that the Act of June 25, 1910 (36 Stat. 847), expressly authorizing the President to make temporary withdrawal "from settlement, location, sale, or entry any of the public lands of the United States," has been repealed. The contention is that the Act of February 25, 1920 (41 Stat. 437), "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," and providing that public lands containing deposits of such minerals "shall be subject to disposition in the form and manner provided by this Act," was mandatory, and that the President was without power to withdraw such lands from disposition as provided in the Act. Sec. 13 of that Act, relating to oil and gas, provides in part "that the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * *. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to

the legal subdivisions of the public land surveys if the land be surveyed * * *."

Sec. 14 provides in part that "upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: * * *."

There is no provision in the Act purporting to repeal or modify the Act of 1910, and in our view such a modification may not be implied. The provision in the first section that the lands containing certain named mineral deposits "shall be subject to disposition in the form and manner provided by this Act" is general, and no more mandatory than 1872 (17 Stat. 91, R. S. 2319, 2329) was the provision in the Act of ~~1897 (29 Stat. 526)~~ declaring all public lands containing petroleum or other mineral oils to be "free and open to occupation, exploration and purchase by citizens of the United States * * * under regulations prescribed by law"; and yet the President withdrew without direct congressional authority such public lands, and his action was sustained in the Midwest case (236 U. S. 459). But it is insisted that the Act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry," and that the application for permit and the lease which may follow discovery of oil under the Act of 1920 are not embraced within those terms. It is apparent, we think, that the Act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.

In Mason v. United States, 260 U. S. 545, by Executive order dated December 15, 1908, lands had been "withdrawn from settlement and entry, or other form of appropriation." It was contended that this order did not include appropriations by mining locations. The Court observed: "The words 'settlement and entry,' it is said, apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; that mining lands are acquired, not by settlement or entry, but by location and development; that *that* this process is not covered by the words 'other form of appropriation', limited,

as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. * * * *If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized?* (Italics ours.) None has been suggested and we can think of none. * * * Moreover, the circumstances leading up to and accompanying the issuance of the order demonstrate conclusively that its main, if not its only, purpose was to preserve from private appropriation the oil and gas which the lands were thought to contain pending investigation and congressional action, and this purpose would have been subverted by appropriations of the nature here involved quite as much as by other forms. We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order and consequently were prohibited by it."

Under the Act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. This, we think, was akin to location or entry, as used in the Act of 1910.

If, as suggested by counsel for appellee, the Act of 1910 has no application, then it well might be held that an implied power to withdraw was reposed in the President under the Act of 1920. United States v. Midwest Oil Co., 236 U. S. 459.

Under the general mining laws a citizen was free to go upon the public domain. He did the work necessary to discover minerals, staked his claim, recorded notice in the mining district or county records, and his rights became fixed. Forbes v. Gracey, 94 U. S. 762; Belk v. Keagher, 104 U. S. 279. This was true as to public lands containing oil and gas until the Act of February 25, 1920 (41 Stat. 437). Under the provisions of that Act, as already appears, a citizen no longer has a right to go upon public lands of the United States to prospect for oil or gas, unless permitted to do so by the Secretary of the Interior, under such "proper rules and regulations as he may prescribe" (Sec. 13). It is at once apparent that there is a marked distinction between the old law and the new. Under the old law a citizen was free to make explorations as a matter of right.

Under the new law he must apply for the privilege. Until that privilege is granted, through the issuance of a permit, he has no vested interest. It is apparent, we think, that Congress recognized the distinction between the old law and the new and that the President might at any time, if conditions changed, withdraw the public lands from exploration. Under Sec. 13 the Secretary is "authorized" to grant prospecting permits. Under Sec. 14, if a permit has been granted and the permittee has incurred the expense incident to the exploration and discovery of "valuable deposits of oil or gas", he "shall be entitled to a lease." Thus Congress recognized that the mere filing of an application for a permit confers no vested right upon the applicant, but that if a permit be issued and he goes on the land and makes a discovery he has such an interest as must be recognized.

Congress, of course, knew that, if changed conditions rendered advisable the temporary withdrawal by the Executive of the public lands from further exploration, thousands of such applications for permits might be pending. It was careful, therefore, to distinguish between an application for a permit, and the rights that might be acquired under an issued permit. Every applicant for a permit was charged with knowledge that the Executive might temporarily withdraw the lands from further exploration, and that his application was, therefore, subject to such authority of the Executive. We rule that the order of the Secretary rejecting Barton's application for a permit was a valid exercise of power by the Executive.

Mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, to remedy and not to promote a wrong, to compel the performance of an actual duty rather than to direct the performance of an act which will work public or private mischief. While classed as a legal remedy, its issuance is largely governed and controlled by equitable principles. Duncan Townsits Co. v. Lane, 245 U. S. 308; Arant v. Lane, 249 U. S. 367; Ex Parte Skinner & Eddy Corp., 265 U. S. 86; Work v. Rives, 267 U. S. 175; Payne v. United States, 50 App. D. C. 119, 269 F. 198; Morgan v. Howard, 54 App. D. C. 3, 293 F. 650; Stowell v. Deming, 57 Epp. D. C. 223, 19 F. (2d) 697. In the exercise of a sound judicial discretion, the court must be controlled by settled legal principles.

As observed in the Midwest case (236 U. S. 471), "The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large." In the present case, his orders, issued through the Secretary, were intended to meet an emergency occasioned by the great over-production of oil and gas, the waste incident thereto, and other public considerations. There was available to him the advice of the Attorney General on all questions of law that might be involved. It was necessary to interpret the applicable statutes, and we have expressed the view that they were correctly interpreted; but, in any event, it would require a very clear case to justify a court in arresting and suspending the action of the Executive taken in the public interest. The record does not present such a case.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Reversed.

Chas. H. Robb, Associate Justice.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Department of the Interior, Appellant, v. United States of America ex relatione Roy G. Barton. Opinion of the Court per Mr. Justice Robb. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry Hodges, Clerk.

Number 5241.

Mr. Justice Van Orsdel, dissenting:

I am compelled to dissent from the opinion and judgment of my associates.

It is conceded that the applicant Barton possessed all the qualifications necessary under the Leasing Act to entitle him to a permit. In other words, but for the order of the Secretary suspending the operation of the Leasing Act, he would have been compelled to grant Barton's application. We start, therefore, with an applicant entitled to a permit

at the time the order was made suspending the provisions of the Leasing Act.

The Act of 1910, vesting authority in the President to withdraw public lands from "settlement, location, sale, or entry", specifically provides the terms upon which this Executive authority may be exercised. It must be done by a formal proclamation, which the Secretary of the Interior is required, by the terms of the Act, to report to Congress at the next regular session after the date of withdrawal. Prior to the enactment of this statute, lands had been withdrawn by proclamation of the President without any particular authority of statute. Congress, therefore, in the 1910 Act, manifested a clear intention to keep control of the withdrawals of public lands to the extent of specifying the manner and terms under which they could be withdrawn by the President, and in addition requiring notice to be given it of such withdrawals by the Secretary of the Interior in order that the action of the President, if deemed advisable, might be promptly revoked.

This brings us to what was done in this case. No proclamation, formal or otherwise, was ever issued by the President, and no notice of any proclamation was given Congress by the Secretary, as required by the 1910 Act. The order of the Secretary, telegraphed the local land officers, was based upon the following newspaper report under date of March 12, 1929, purporting to express the views of the President: "There will be no leases or disposal of government oil lands, no matter what category they may lie in, of government holdings or government controls, except those which may be mandatory by Congress. In other words, there will be complete conservation of government oil in this administration."

It will be observed that this merely purports to state a future policy which the President might or might not adopt in respect to government oil lands. If was not transmitted by the President to the Secretary of the Interior. The information upon which he based his order was obtained exclusively through the press. The press report merely referred to a declaration said to have been made by the President, which he could only make effective by a formal proclamation. There was, therefore, no proclamation what-

ever under the terms of the 1910 Act which would justify in the remotest degree the action taken by the Secretary of the Interior.

Neither can the action of the Secretary be upheld under the doctrine of acquiescence. It is undoubtedly true that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President." The President is the head of the Executive Department of the government, and the lawful acts of his subordinates will be presumed to be his acts, but this presumption does not extend to unlawful acts of subordinates. The difficulty here is that the Secretary acted without the scope of his power in the suspension of the oil leasing act. He was totally without power to act until certain statutory conditions had been complied with; namely, the issue of a proclamation by the President.

The cases relied upon in the majority opinion are not in point. In Wilcox vs. Jackson, 13 Pet. 498, a preemption entry had been made upon land set aside and occupied for more than twenty years as a military reservation, on which the government had expended large sums of money under the direction of the Secretary of War. Of course, a long continued use of public land by the government itself for military purposes, or for other purposes, would constitute an occupancy by the government on its own land, amounting to a withdrawal of the land from entry and settlement; and, whether done by direct authority of the President or by the lawful act of the Secretary of War, the President, after this long lapse of time, would be assumed to have acquiesced in the withdrawal and occupation of the land.

The case of Wolsey vs. Chapman, 101 U. S. 755, has even less application to the present case than does the Wilcox case. Here, a large tract of land had been granted to the Territory of Iowa for the development of navigation on the Des Moines river. The execution of the Act was delegated to the Secretary of the Interior, and was accordingly within the lawful scope of the authority vested in him. A controversy arose as to the limits of the land granted—whether it extended beyond a point in the river known as Raccoon Fork. The matter required determination from many angles by the Department of the Interior,

and, to protect the interests of all concerned, the Secretary suspended settlement on the lands in question until the matter could be legally determined. It was said, and properly so, that the act of the Department, being within the scope of its powers, would be regarded in law as the act of the President. The difference between that case and the one at bar is that here there is only one law under which a withdrawal such as we are here considering can be made; namely, through the Proclamation Act of 1910. This act is a specific grant of power by Congress to the President by which he may in his discretion withdraw public lands from entry, sale, or settlement. Being a grant of power belonging to Congress, it should strictly be complied with, and the courts will not imply compliance from circumstances such as those involved in this case.

The case of United States vs. Midwest Oil Company, 236 U. S. 459, has little or no analogy to this case. There, the proclamation of the President, issued before the enactment of the 1910 statute, hence without specific statutory authority, described accurately the territory withdrawn, the character of the land, and the object of withdrawal. The President, doubtful of his authority in the premises, submitted the whole matter to Congress for its approval. It resulted in the prompt enactment of the 1910 statute. The proclamation was prepared with all the formalities and dignity of a document promulgated by the President with a view to affecting great public and private interests. In that case the oil company entered upon the lands after the proclamation was issued. The court, in its opinion, strongly, implied that if the entry upon the lands had been made prior to the issuance of the proclamation by the President, it would have had a different case. Here the application was filed prior to the order of the Secretary, and here there was no proclamation whatever as required by statute.

It is not true that the applicant was required to do nothing on the land before filing his application for a permit. He was required by the Leasing Act to seek out the location, to post notices, giving a description of the land for which application would be made,—if surveyed land, by the lines of survey; if unsurveyed, by descriptive metes and bounds. This constituted an entry upon the land, which

developed into a right with the filing of the application of which the applicant cannot be divested by any act of the Executive Department. This is settled law by numerous decisions of the Supreme Court as to entry upon public lands, such as homestead, preemption, etc. Entry upon oil lands is in every respect entitled to the same legal significance as entry upon lands for the purpose of acquiring title. In Mason v. United States, 260 U. S. 545, it was contended that the words "settlement and entry" applied only to the act of settling upon the soil and making entry in the land office, and that it did not apply to mining lands which it was contended were not acquired by settlement and entry but by location and development, but the court said: "If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested and we can think of none."

This is not an action to mandamus the President. The writ runs against the Secretary of the Interior and the Commissioner of the General Land Office. The President, so far as I am able to observe, has had nothing to do with this case. The case grew out of orders originated in the Land Department, based upon newspaper rumor; and the action here is to compel the Secretary of the Interior and the Commissioner of the General Land Office to perform purely administrative duties imposed upon them by law. That mandamus will lie for this purpose is too elementary to require citation of authority. While the judgment is to require a departmental officer to perform a purely administrative duty imposed by Congress, the court has no power under the sanction of "judicial discretion" to withhold its mandate, even though, in its judgment, to compel the enforcement might not be in the public interest. The policy of the law belongs to the legislative and not the judicial department of the government.

The court is called upon here to determine purely questions of law, and it is immaterial whether one, or five-thousand, or ten-thousand applicants would be affected by the court's decision. Neither, in the agitated state of the public mind, should the fact that this is an "Oil Case" entitle it to any particular sanctity in the eyes of the law, or furnish adequate ground for the wholesale slaughter of private property rights by judicial decree. The present inquiry

is limited to determining the important questions of law here involved. It would seem, therefore, unnecessary to consider the facts stressed in the majority opinion "that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest"; or that, if the judgment be affirmed in this case, "it would probably result in the reinstatement of 'more than five-thousand applications for oil and gas permits on the public lands pending in the Land Office in Washington, and an unknown number in the field offices.'"

These might furnish commendable reasons for a proper and lawful withdrawal of the lands either by formal proclamation of the President or by Act of Congress, but we have hardly reached the period where the laws of the land can be suspended or repealed by the arbitrary methods here employed.

For the reasons stated, the judgment should be affirmed.

Josiah A. Van Orsdel, Associate Justice.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Interior, Appellant, v. United States of America ex rel. Roy G. Barton. Dissenting Opinion per Mr. Justice Van Orsdel. Court of Appeals, District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,
OCTOBER TERM, 1930

No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.
4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

Homer Hendricks, Homer Hendricks, of Messrs. Miller & Chevalier, 922 Southern Building, Washington, D. C., Attorney for Appellee.

Service of the foregoing motion of Appellee is hereby accepted, Dec. 11, 1930.

(Sgd.) O. F. Graves, Attorney of Record for Appellants.

[Endorsed:] No. 5251. Ray Lyman Wilbur et al., appellants, v. United States ex rel. H. H. Simpson, appellee. Designation of record. Homer Hendricks, of Miller & Chevalier, 922 Southern Bldg., Washington, D. C., Attorney for appellee. Court of Appeals, District of Columbia. Filed Dec. 12, 1930. Henry W. Hodges, clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 46 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants, vs. United States of America, ex rel. H. H. Simpson, No. 5251, October Term, 1930, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of December, A. D. 1930.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
JAN 22 1931
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 676

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON, Petitioner,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

HOMER HENDRICKS,
DONALD V. HUNTER,
JAMES C. SHEPPARD,
Counsel for Petitioner.

(35,598)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 676

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON, Petitioner,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

Your petitioner, H. H. Simpson, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia, entered on December 1, 1930 (R. 28), in the cause entitled "Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office," being cause No. 5251 on the docket of said Court and

reversing the judgment of the Supreme Court of the District of Columbia (R. 22).

I.

Summary Statement of the Matter Involved.

This case involves the validity of the action of the Secretary of the Interior in suspending the execution of Section 13 of the Act of February 25, 1920 (41 Stat. 437, Ch. 85), hereinafter called the "Oil Leasing Act," entitled "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." Sec. 13 authorizes the Secretary—

> "To grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil and gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field * * *."

On May 25, 1929, the petitioner filed in the District Land Office at Sacramento, California, two applications for permits to prospect for oil and gas, pursuant to the provisions of Sec. 13 of the aforesaid Act, upon certain open and unappropriated public lands of the United States, and on June 6, 1929, filed in said Office a third similar application for other open and unappropriated public lands (Pars. 1, 19, and 29 of Petition, R. 2, 5, and 6; admitted in Pars. 1, 19, and 29 of Answer, R. 13, 15).

Requisite filing fees were tendered with each of these applications (Pars. 5, 23, and 33 of Petition, R. 2, 5, and 7; Pars. 5, 23, and 33 of Answer, R. 14, 15, and 15-16).

The applications were in the form prescribed by the Regulations (Circular 672, 47 L. D. 437) promulgated under the provisions of the Oil Leasing Act. (Pars. 2, 20, and 30 of Petition, R. 2, 5, and 7; admitted in Pars. 2, 20, and 30 of Answer, R. 14, 15), and the averments therein, if true, were such as to entitle the petitioner to permits to prospect for oil and gas upon the areas therein described.

The Register of the Sacramento Land Office, by letters dated May 27 and June 7, 1930, rejected petitioner's applications and returned the filing fees, for the sole reason that the Secretary, by order of March 20, 1929, had directed as follows:

> "Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits." (Pars. 8, 26, and 36 of Petition, R. 3, 5-6, 7-8; admitted in Pars. 8, 26, and 36 of Answer, R. 14, 15, and 16).

Appeals from the Register's action in refusing to receive petitioner's applications were duly prosecuted before the Secretary, who affirmed the action of the Register and has at all times since refused to receive and act upon them. (Pars. 11, 27, and 37 of Petition, R. 3-4, 6, and 8; admitted in Pars. 11, 27, and 37 of Answer, R. 14, 15, and 16).

The petitioner, having exhausted his remedies before the Interior Department, filed suit in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of the Interior and the Commissioner of the General Land Office to accept for filing his said applications and to pass upon the merits thereof as provided by Sec. 13 of the Oil Leasing Act (R. 1-13). The Secretary and the Commissioner filed an answer (R. 13-20), to which the petitioner demurred (R. 21). The Supreme Court of the District of Columbia sustained the petitioner's demurrer to the answer (R. 21), and ordered the issuance of a writ of mandamus requiring the Secretary to accept for filing the said applications, and directing the Secretary to proceed therewith according to law (R. 22).

The Secretary and the Commissioner appealed to the Court of Appeals of the District of Columbia, where the case was subsequently submitted and argued with a group of other cases involving similar issues of law (R. 25-26), and on December 1, 1930, the Court of Appeals handed down a majority opinion (R. 27, 29-37), reversing the judgment of the trial court, to which Mr. Justice Van Orsdel dissented and filed a separate opinion (R. 27, 37-42).

In the courts below the Secretary assigned two reasons for refusing to receive and act upon the said applications—

(1) That under Sec. 13 of the Oil Leasing Act, he is vested with discretion as to whether or not he will

receive and consider on their merits any such applications whatever (Par. 40 of Answer, R. 16); and

(2) That his suspension of the execution of Sec. 13 was because of an oil conservation policy alleged to have been "informally" proclaimed by the President and put into effect by the Secretary, the latter claiming that the "effect" of the Secretary's action "was to cause all public lands containing oil to be temporarily withdrawn from all exploration for oil and gas" under the said Act (Par. 41 of Answer, R. 17).

The steps taken, which were claimed by the Secretary to have constituted, in effect, a withdrawal of all lands subject to prospecting operations under Sec. 13 of the Oil Leasing Act, were:

On March 12, 1929 a press notice is alleged to have emanated from the President as follows:

> "There will be no leases or disposal of Government oil lands, no matter what category they may lie in, of Government holdings or Government controls, *except those which may be mandatory by Congress.* In other words, there will be complete conservation of Government oil in this Administration" (R. 38). (Our italics.)

On March 13, 1929 (without, so far as the record shows or has ever been disclosed, any instructions from the President), the Secretary caused the following telegram to be sent to the Registers of all Public Land Officers:

> "No oil and gas prospecting permits will be issued on and after March twelfth, nineteen

twenty nine. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked" (R. 30).

Thereafter, the Secretary issued Departmental Orders Nos. 337 and 338, the material parts of which are:

Departmental Order No. 337, dated March 16, 1929:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

"There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.

* * * * * * * *

"Where land covered by pending applications is likely to be drained by adjoining wells on privately-owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.

"With regard to the 20,000 outstanding permits on public lands, the Department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry

on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

* * * * * * *

"Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

"No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929" (R. 18-19).

Departmental Order No. 338, dated March 20, 1929:

"The following outlines the general procedure in the Department of the Interior for exe-

cuting the President's public land oil conservation policy;

* * * * * * *

"4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

"5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

* * * * * * *

"7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

* * * * * * *

"12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wild-catting fields where a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration" (R. 19-20).

Neither of said orders withdrew any lands from public entry, nor purported to do so. No other orders have been subsequently issued.

The President has made no direct public statement, proclamation, or order, nor has he executed any document in respect to these matters.

II.

Reasons Relied on for the Allowance of the Writ.

1. THE COURT OF APPEALS HAS DECIDED A QUESTION OF GENERAL IMPORTANCE AND OF SUBSTANCE RELATING TO THE CONSTRUCTION OF STATUTES OF THE UNITED STATES WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As hereinbefore indicated, this case involves the validity of the Secretary's action in suspending the execution of Sec. 13 of the Oil Leasing Act (41 Stat. 437, Ch. 85), which authorizes him to receive and consider on their merits applications for permits to prospect for oil and gas upon the public domain. The Secretary's action has deprived many citizens of valuable rights expressly granted to them by Congress. The operation of Sec. 13 has been altogether suspended as regards the receiving of new applications for prospecting permits. The primary purpose of Congress in passing the said Act "to promote the mining of * * * oil * * * on the public domain" has been nullified.

This case further involves the question whether an informal press notice constitutes a withdrawal by the

President under the Withdrawal Act of June 25, 1910 (36 Stat. 847, Ch. 421) which places the responsibility for withdrawals on him, and, generally, what constitutes a valid "withdrawal" of public lands from "settlement, location, sale or entry," and whether withdrawals, if valid, must be in compliance with said Act.

None of these questions has been settled by this Court, and the public and governmental interest in them is such that they should be settled here.

2. THE COURT OF APPEALS HAS NOT GIVEN PROPER EFFECT TO THE APPLICABLE DECISIONS OF THIS COURT.

The majority of the Court of Appeals found this case controlled by the decisions of this Court in *United States v. Midwest Oil Company*, 236 U. S. 459; *Wilcox v. Jackson*, 13 Pet. 498, and *Wolsey v. Chapman*, 101 U. S. 755, notwithstanding that none of them related to withdrawals made after the enactment of the Withdrawal Act of June 25, 1910, and notwithstanding that there was involved in each of them withdrawals of specified lands, whereas in the instant case all that was done was to direct that execution of part of the Oil Leasing Act be suspended. The principles which, it is urged, should govern are those stated by this Court in *Work v. United States ex Rel. Mosier*, 261 U. S. 351, in which it was held that it is the duty of the Secretary to administer acts of Congress as he finds them, and not as he thinks they ought to be in view of what is, in his opinion, a change of conditions since Congress acted.

WHEREFORE it is respectfully urged that this petition for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia be granted; that said judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may seem just and proper.

H. H. SIMPSON,
By HOMER HENDRICKS AND
DONALD V. HUNTER,
922 *Southern Building,*
Washington, D. C.
JAMES C. SHEPPARD,
458 *South Spring Street,*
Los Angeles, California.
Counsel for Petitioner.

FILE COPY

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 676.

UNITED STATES OF AMERICA, EX REL. H. H. SIMPSON,
Petitioner,
v.
RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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MILLER & CHEVALIER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1930.

No. 676.

UNITED STATES OF AMERICA, EX REL. H. H. SIMPSON,
Petitioner,
v.
RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court of Appeals.

The opinion of the Court of Appeals in this case has not yet been officially reported. It was delivered on December 1, 1930, and appears at pages 27-28, 29-42 of the Record.

II.

Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. 28). The petition for certiorari was filed in this Court on January 22, 1931, and authority to hear the same is conferred by Sec. 240 of the Judicial Code as amended by Sec. 1 of the Act of Feb. 13, 1925 (43 Stat. 936, 938).

III.

Statement of the Case.

A full statement of the case has been given in the Petition (pp. 2-9).

IV.

Specification of Errors to be Urged.

1. The Court of Appeals erred in failing to hold that Sec. 13 of the Act of Feb. 25, 1920 (hereinafter called the "Oil Leasing Act"), Ch. 85, 41 Stat. 437, vests the Secretary with jurisdiction to receive and consider on their merits applications for oil and gas prospecting permits, which he may not refuse to exercise.

2. The Court of Appeals erred in holding that the several steps alleged to have been taken by the Secretary constituted, in effect, a withdrawal of all public lands from exploration of oil and gas.

3. The Court of Appeals erred in holding that the petitioner was not entitled to a writ of mandamus compelling the Secretary to receive and pass upon petitioner's applications and otherwise to perform the duties delegated to him in Sec. 13 of the Oil Leasing Act.

V.

Argument.

Summary.

Sec. 13 of the Oil Leasing Act requires the Secretary to receive and consider on their merits, applications for prospecting permits, and he is without authority to suspend the execution of the law.

The majority of the Judges of the Court of Appeals were in error in upholding the Secretary's claim that there was a withdrawal "in effect," because his Orders were not intended to, and did not in effect result in a withdrawal of public lands; and further, because his Orders were not in compliance with the Withdrawal Act of June 25, 1910 (Ch. 421, 36 Stat. 847), and were therefore ineffective as valid withdrawals. As to this, the majority of the Judges of the Court of Appeals misconstrued the opinions of this Court in *United States v. Midwest Oil Co.*, 236 U. S. 459, *Wilcox v. Jackson*, 13 Pet. 598, and *Wolsey v. Chapman*, 101 U. S. 755.

The trial court properly issued a writ of mandamus under the facts of this case, because the Oil Leasing Act was passed to and does grant rights to qualified applicants for prospecting permits, and because the writ only required the Secretary to take jurisdiction of administrative matters imposed upon him by law.

Statutes Involved.

Oil Leasing Act (Ch. 85, 41 Stat. 437):

"An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

"*Be it enacted by the Senate and House of*

Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities * * *."

* * * * * * * * *

"OIL AND GAS

"SEC. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations, as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered,

and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered."

* * * * * * * *

"SEC. 14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit."

* * * * * * * *

"SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act."

* * * * * * * *

"SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the

State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct. * * *"

Withdrawal Act of June 25, 1910 (Ch. 421, 36 Stat. 847):

"An Act to authorize the President of the United States to make withdrawals of public lands in certain cases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

* * * * * * * * *

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (This Act now appears with slight changes, as Secs. 141-143, Title 43, U. S. Code.)

1. SEC. 13 OF THE OIL LEASING ACT REQUIRES THE SECRETARY TO RECEIVE AND CONSIDER ON THEIR MERITS, APPLICATIONS FOR PROSPECTING PERMITS, AND HE IS WITHOUT AUTHORITY TO SUSPEND THE EXECUTION OF THE LAW.

The Oil Leasing Act is by its title—

> "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain."

Sec. 1 declares the intention of Congress to be—

> "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States ..... *shall be subject to disposition* in the form and manner provided by this Act. ....."

These general provisions are mandatory and show that Congress was issuing directions to the end that the fullest development of mineral resources owned by the United States should be encouraged.

Sec. 13 of the Act provides that the Secretary—

> "is hereby authorized, under such necessary and proper rules and regulations as he may prescribe to grant to any applicant qualified under this Act a prospecting permit. ...."

The foregoing authorization is not, as the Secretary has assumed in these proceedings, a grant of jurisdiction which he may or may not exercise as he sees fit. On the contrary, the Act grants valuable rights to citizens of the United States, and contem-

plates that when citizens tender applications in the exercise of such rights, the Secretary shall discharge the duty imposed upon him of granting the application, if in conformity with the law and the "necessary and proper rules and regulations" prescribed by him. The Secretary in this case has refused even to consider the applications of petitioner.

The use of the word "authorized" is apt and appropriate, not, as the Secretary has supposed, to leave the matter of execution or suspension of the law to his judgment, but as limiting the extent to which he may go in granting the permits provided for by the Act. Thus, the Secretary is authorized to grant prospecting permits, subject to such limitations as appear in the Act. These limitations go to the citizenship of the applicant (Sec. 1), and to the period of time during which the permit is to run ("not exceeding two years"), the amount of land to be included in each permit ("not to exceed two thousand, five hundred and sixty acres"), the kind of lands to be embraced in the permit ("not within any known geological structure of a producing oil or gas field"), and the amount of drilling which each permittee shall be required to do in order to retain his permit (Sec. 13). The "authorization" does not in terms give the Secretary authority to decide whether or not any permits at all will issue under Sec. 13, and Congress cannot reasonably be presumed to have laid down limits of jurisdiction, without intending that such jurisdiction, when invoked by proper parties, should be exercised.

The legislative history of this Act is well known. The project of leasing lands bearing non-metalliferous minerals, instead of parting with title thereto, as

theretofore provided by the general mining laws (See Act of Feb. 11, 1897, Ch. 216, 29 Stat. 526), was before Congress for some ten years prior to the Act of Feb. 25, 1920. The previously existing situation was frequently referred to in the debates in the Senate and House of Representatives at the time of consideration of the Oil Leasing Act. These debates conclusively show that Congress took affirmative action to stimulate the development of mineral resources in the public lands of the Western States, and intended to give the greatest encouragement to persons who would spend their time and money in prospecting for oil (see, especially, Vol. 58, Congressional Record, pages 4112, 4268, 4270-4273, and 7537). In this connection, Senator Smoot, the author of the Bill, stated as follows:

> "Mr. President, there are withdrawn from all development 6,500,000 acres of the public domain supposed to contain oil, or, in other words, designated as oil lands. There are 2,700,000 acres of phosphate lands withdrawn in the same way. There are 3,500,000 acres of oil-shale lands that have already been classified. There are 43,700,000 acres of coal lands withdrawn, and of those 43,700,000 acres the Government up to the present time has classified as coal lands only 27,300,000 acres. That vast acreage of the public domain, all situated in the western part of our country, has been tied up for years, preventing any form of development. No development upon these lands can be made today. The time has come, in the opinion of the Committee on Public Lands, that legislation must be passed in order that these great undeveloped resources of our country shall be made use of by the American people.

> "When I was told 12 years ago that such withdrawals would be made, and that no development upon these lands should be allowed until the Western Senators had agreed to a leasing system, I doubted at that time whether the program would be carried out. It has been carried out, and today we find that there is an actual scarcity of some of the minerals enumerated in the pending bill. I say now that unless there is a change in policy and the development of the lands for the minerals begins at an early time it will cost the American people millions of dollars and perhaps the loss of a great portion of their foreign commerce." (58 Cong. Rec. p. 4112.)

The House Committee on Public Lands in favorably reporting the Bill, which became the Oil Leasing Act, said:

> "Your committee believes that the present draft represents an improvement on all previous bills, and that if enacted into law will promote the prospecting and development of the mineral deposits in the public lands with due protection to the public interest." (House Report No. 398, 66th Cong., 1st Sess., page 18.)

Previous to the Secretary's Orders of March, 1929, involved in this case, the Interior Department had continuously administered the Act upon the theory that it was intended to *promote* and encourage the discovery of new oil fields (see, Par. 3, p. 8, of the Regulations concerning Oil and Gas Permits, Circular No. 672, 47 L. D. 437; *Enlow v. Shaw*, 50 L. D. 339; and Instructions of June 3, 1924, 50 L. D. 546). The only cases in which discretionary power to reject permit applications has been exercised, were those in which the lands involved were not of the

kind which Congress intended should be subject to prospecting when it passed the Act. (Compare, *Wilmer Jeanette*, 47 L. D. 582, *Martin Wolfe*, 49 L. D. 625, *J. D. Mell*, 50 L. D. 308, *Neal v. Newton et al.*, 51 L. D. 477, and *Chas. West*, 50 L. D. 534).

The majority opinion of the Court of Appeals is not based on the Secretary's claimed discretionary power to suspend the execution of Sec. 13 of the Oil Leasing Act. Indeed, that court could not well have adopted such a position in view of its decision in the case of *West v. United States ex rel. Alling*, 58 App. D. C. 329, 30 F. (2d) 739, in which mandamus to compel the issuance of an oil prospecting permit was sustained, the court saying:

> "It will be observed that the act, in section 1, expressly provides for the disposition of oil and gas lands through prospecting permits and subsequent leasing 'to citizens of the United States', and the power vested in the Secretary to establish rules and regulations for the carrying out of the act does not imply the power to establish a rule or regulation that will conflict with an express provision of the act. It follows, we think, that if the applicant sufficiently qualifies as a citizen of the United States, the Secretary is powerless to refuse such applicant a permit or to make any rule of regulation that interferes with the right of such applicant."

Nor can it be reasonably inferred that Congress, having "authorized" the granting of prospecting permits, gave the Secretary *carte-blanche* to substitute a policy of discouragement of all development in lieu of the policy expressed by Congress in the Act to *promote* such development. On the contrary,

Congress has by subsequent legislation unmistakably indicated its purpose to keep control of the development of new oil fields by prospecting permits, by enacting from time to time amendments to Sec. 13 of the Oil Leasing Act, extending the time within which permittees may begin or complete drilling operations (see the *Act of Jan. 11, 1922,* Ch. 28, 42 Stat. 356; *Act of Apr. 5, 1926,* Ch. 107, 44 Stat. 236; *Act of March 9, 1928,* Ch. 163, 45 Stat. 252; and *Act of Jan. 23, 1930,* Ch. 25, 46 Stat.).

We submit that the Oil Leasing Act gives the Secretary no authority to decide that he will no longer issue permits under Sec. 13, and that the Supreme Court of the District of Columbia, and Mr. Justice Van Orsdel in his dissenting opinion in the Court of Appeals (R. 37-42), properly concluded that the writ of mandamus should issue to compel the Secretary to perform his statutory duties.

2. THE COURT OF APPEALS ERRED IN SUSTAINING THE SECRETARY'S CLAIM OF "WITHDRAWAL IN EFFECT"—

(1) Because His Orders Were Not Intended to, and Did Not in Effect, Result in a Withdrawal of Public Lands; and

(2) Because His Orders Were Not in Compliance With the Withdrawal Act of June 25, 1910, and Were Therefore Ineffective as Valid Withdrawals.

The practice of withdrawing portions of the public domain from disposal under acts of Congress, for special public uses, is one of long standing. The

long-established practice has been to promulgate orders designating as "withdrawn" or "reserved" areas of land described with particularity in the orders. The method consistently used in making withdrawals is plainly shown in United States Geological Survey Bulletin No. 623, entitled "Petroleum Withdrawals and Restorations Affecting the Public Domain." A typical withdrawal order taken from this compilation is printed in the Appendix to this brief. This compilation of withdrawal orders indicates that every withdrawal order made after the enactment of the Act of June 25, 1910, was made in the form prescribed by that Act, and was signed by the President.

Prior to 1910 these withdrawals or reservations were made without express authority from Congress. By the Withdrawal Act of June 25, 1910 (Ch. 421, 36 Stat. 847), however, Congress delegated to the President express authority to make withdrawals "in certain cases." This Act reads in part as follows:

> "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.
>
> * * * * * * * * *

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (This Act now appears with slight changes, as Secs. 141-143, Title 43, U. S. Code.)

Under this Act the following matters seem essential to a valid withdrawal:

(1) The withdrawals shall be made by the President;
(2) A specific order of withdrawal is required;
(3) The orders of withdrawal shall specify the purposes for which the lands are withdrawn;
(4) The purpose of the withdrawal must be limited to the reservation of public lands, for water-power sites, irrigation, classification of lands, or other public purposes;
(5) The Secretary of the Interior shall report such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

This Act had been in effect almost nineteen years when the several acts of the President and the Secretary, now asserted to have been a withdrawal "in effect", were had, and the instant and related cases are the only ones, so far as has been shown, or as counsel can find, in which decision to suspend the operation of a public land statute has been made by the Secretary. Certainly this is the first case in which such action has been either claimed or held to constitute "in effect" an exercise of the power granted by Congress to withdraw or reserve public lands.

What is offered as a withdrawal in this case?

Soon after taking office, the President is alleged to

have released an informal press notice, on March 12, 1929, in which he is reported to have said:

> "There will be no leases or disposal of Government oil lands, no matter what category they may lie in, of Government holdings, or Government controls, *except those which may be mandatory by Congress.* In other words, there will be complete conservation of Government oil in this Administration." (R. 38; our italics.)

As was pointed out by Mr. Justice Van Orsdel in the Court below—

> "It will be observed that this merely purports to state a future policy which the President might or might not adopt in respect to government oil lands." (R. 38.)

The President gave no orders to anyone.

The Secretary, however, caused telegrams to be sent to the Registers of all Public Land Offices, directing them to reject all applications for oil and gas prospecting permits and to receive no more applications (R. 30). These instructions were followed by two formal orders to the same effect (R. 18-20), which were declared to be for the purpose of making effective the President's oil conservation policy. These orders, originating with the Secretary and executed by him without any instructions from the President, were plainly issued on the ground that the Secretary believed that Sec. 13 of the Oil Leasing Act gave him authority to suspend the execution of the law. It seems perfectly apparent that they were not intended to be withdrawals. The President had stated that government oil lands would not be disposed of except

where mandatory, and the Secretary mistakenly assumed that the issuance of prospecting permits had not been made mandatory by Congress.

No orders of withdrawal were issued; no lands were indicated as withdrawn; and no report of what is now claimed to have been a withdrawal has ever been made to Congress. Nothing whatever was done which bore any resemblance to a withdrawal under the Act of June 25, 1910, or under the practice existing before the passage of that Act. Indeed, the orders of the Secretary made provision for the issuance of permits in some cases and non-issuance in others, and for leases which were mandatory under the law, and even now, the Secretary does not assert that any actual withdrawal has ever occurred, but merely that the "effect" of his action "was to cause all public lands containing oil to be temporarily withdrawn from all exploration of oil and gas." (Par. 41 of Answer, R. 17.)

The majority of the Judges of the Court of Appeals were of opinion that the action taken by the Secretary in this case was a valid exercise of powers recognized by this Court in the case of *United States v. Midwest Oil Co.*, 236 U. S. 549. In so doing the majority clearly extended this Court's decision far beyond anything actually decided therein, and beyond any implications involved in this Court's opinion.

The *Midwest* case arose as a result of formal withdrawals made prior to 1910, by the President, of large areas of public lands, in order that Congress might pass legislation providing for a method of disposal of oil lands different from the method then in effect. Thereafter, the defendant oil company went upon certain of the withdrawn lands in reliance on exist-

ing law and was engaged in removing and appropriating oil there found. The Government brought suit against the defendant to recover the land and for an accounting in respect of the oil so removed. This Court held that the withdrawal orders were valid as an exercise of a long-established practice on the part of executive officers which this Court found had been acquiesced in by Congress.

After issuance of the withdrawal orders involved in the *Midwest* case, however, Congress passed the Withdrawal Act of June 25, 1910, specifically authorizing withdrawals "in certain cases", and prescribing the manner in which withdrawals were to be made. This Court, in sustaining the earlier withdrawals, which were not in conformity with the Withdrawal Act, held that the Act showed no purpose to repudiate the withdrawals theretofore made. Said this Court:

> "The legislative history of the statute shows that there was no such intent and no purpose to make the act retroactive, or to disaffirm what the agent in charge had already done. The proclamation of September 27, 1909, withdrawing oil lands from private acquisition, was of far-reaching consequence both to individuals and to the public. It gave rise to much discussion, and the old question as to the authority of the President to make these orders was again raised. Various bills were introduced on the subject, and the President himself sent a message to Congress, calling attention to the existence of the doubt, and suggesting the desirability of legislation to expressly grant the power and ratify what had been done. A bill passed the House, containing such ratification and authorizing future withdrawals. When the bill came to the Senate it

was referred to a committee, and, as its members did not agree in their view of the law, two reports were made. The majority, after a review of the practice of the Department, the acquiescence of Congress in the practice, and the decisions of the courts, reported that the President already had a general power of withdrawal, and recommended the passage of the pending bill, inasmuch as it operated *to restrict* the greater power already possessed. Sen. Rep. 171 (61st Cong., 2d Session)." (Italics ours.)

The view indicated in the opinion of this Court, quoted above, that Congress intended that the Act of June 25, 1910, should *restrict* the greater power to withdraw lands already possessed by the President, had been also indicated by the House Committee on Public Lands, which, in reporting the Bill which became the Act of June 25, 1910, stated:

> "The President has authority to withdraw lands for certain purposes, but there is a difference of opinion as to the extent of that authority. Many claim this authority is as broad as that provided for in this bill; others contend to the contrary. No statute has been found expressly conferring this authority, and the extent thereof has not been settled by the Supreme Court * * *. In view of the conflicting opinions that exist as to the authority for past and future withdrawals, *it is deemed necessary to adopt a measure that will clearly define the extent of such authority.*" (House Report No. 983, 61st Cong. 2d Sess. Our italics.)

It seems plain that, after the enactment of the Act of June 25, 1910, the executive powers of withdrawal were limited to the public purposes therein specified.

The Act authorized withdrawals for "water-power sites, irrigation, classification of lands, or other public purposes." Only the latter of these purposes could possibly apply to the withdrawals alleged to have been effected in this case. It seems obvious that the term "other public purposes" refers to other purposes authorized by law which are of a public character. If Congress had authorized the Secretary (or the President) to take steps to regulate the production of oil in the United States (which it has not, and could not do) then it might be argued with some plausibility that an order withdrawing public lands from prospecting for the claimed purpose of preventing over-production of oil would be for a public purpose within the terms of the Act of June 25, 1910.

The sole authority over oil production vested by law in the Secretary (or the President) is to be found in the Act of February 25, 1920, which was enacted to release lands for prospecting which, as Senator Smoot pointed out (*ante*, pp. 9-10) had been locked up by executive withdrawals for twelve years. Surely only the clearest delegation of discretion to suspend the operation of this Act should be recognized as authorizing the executive department to again lock up in withdrawals the very lands which Congress intended to release.

The majority opinion in the court below (R. 32) further relies on the decisions of this Court in *Wilcox v. Jackson*, 13 Pet. 598, and *Wolsey v. Chapman*, 101 U. S. 755. These cases related to actual withdrawals of public lands, made long prior to passage of the Act of June 25, 1910, and were, moreover, cases where lands were held in a state of reservation for a purpose authorized by law or in order that Con-

gress might act in a legislative capacity. None of these entirely different considerations is involved in this case. There has been, here, no withdrawal or withholding of land from disposal until Congress can pass further legislation, but rather an attempt by the Secretary to suspend part of an Act of Congress because of conditions which he concludes have changed since the Act was passed.

The Court of Appeals failed altogether to give effect to the opinion of this Court in *Work v. United States, ex rel. Mosier*, 261 U. S. 351. In the *Mosier* case a statute directed the Secretary to pay certain royalties accruing from leases of lands of minor Indian wards, over to the guardians of such Indians, unless the Secretary was satisfied that the moneys of the minors were being misused or squandered. Thereafter great quantities of oil were discovered on Indian lands and the royalties greatly exceeded anything anticipated when the statute was enacted. Secretary Work undertook, under regulations adopted by him, to pay only a certain percentage of the royalties to the guardians of minor lessors. This Court held that the Secretary was under a duty to administer the law as he found it and not as he believed in the light of changed conditions it ought to be. This Court said:

> "However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary." (261 U. S. 351, 360.)

The rule that exective officers must reasonably construe Acts of Congress and give effect thereto has been repeatedly applied by this Court. *Work v.*

United States, ex rel. McAlester-Edwards Coal Co., 262 U. S. 200; *Stockley v. United States*, 260 U. S. 532; *Payne v. Central Pacific R. Co.*, 255 U. S. 228; *Lane v. Hoglund*, 244 U. S. 174; *Noble v. Union River Logging R. Co.*, 147 U. S. 165.

3. THE TRIAL COURT PROPERLY ISSUED A WRIT OF MANDAMUS UNDER THE FACTS IN THIS CASE.

In *Work v. United States, ex rel. Rives*, 267 U. S. 175, this Court said:

> "There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 62 L. ed. 914, 38 Sup. Ct. Rep. 408, and Interstate Commerce Commission v. United, States, 224 U. S. 474, 56 L. ed. 849, 32 Sup. Ct. Rep. 556."

As Mr. Justice Van Orsdel said in his dissenting opinion—

> "This is not an action to mandamus the President * * *. The President, so far as I am able to observe, has had nothing to do with this case. The case grew out of orders originated in the Land Department, based upon newspaper rumor; and the action here is to compel the Secretary of the Interior and the Commissioner of the General Land Office to perform purely administrative duties imposed upon them by law." (R. 41.)

The Oil Leasing Act, as has been fully shown herein, was passed to afford opportunities to citizens to prospect for and discover minerals upon the public domain. The Interior Department itself has recognized that these rights constitute property (*Haynes v. Smith*, 51 L. D. 208), and no one will deny that such rights are valuable.

The Oil Leasing Act was passed to encourage citizens to go upon the public domain and expend their time and money and to provide (Sec. 35) additions to the reclamation, public roads and school funds of the Western States, and in refusing to entertain further applications, the Secretary has completely nullified these purposes. Surely only the clearest delegation of discretion to suspend the operation of the Act should be recognized as authorizing the Interior Department to suspend the development of the very lands which Congress in passing the Act intended to release in order *to promote* development of their mineral contents.

That the States which suffered from the administrative withdrawals which preceded the enactment of the Oil Leasing Act are quick to resist an attempted executive repeal of the statute which brought them relief from early executive withdrawals is shown by the intervention in the Court below of the counsel for four Western States as *amici curiae* (R. 25).

VI.

Conclusion.

Since the action of the Secretary in this case was unwarranted by the terms of the Oil Leasing Act and went far beyond the limits of his discretion, to the

detriment of this petitioner, and since the Secretary's action results in nullifying part of an Act of Congress and restores a situation which Congress intended to remove when it passed the Oil Leasing Act, we submit that the issuance of a writ of mandamus as prayed for was fully warranted, and that the questions involved are of such general importance and substantial nature that the writ of certiorari, now sought, should be granted.

There is no conflict between courts of different jurisdictions on the questions involved, and none can arise since proceedings raising the questions can be brought only in the District of Columbia. However, two judges of the Supreme Court of the District, and one of the three judges of the Court of Appeals have found that the petitioner's suit is well founded, and the issues are such as should be settled by this Court.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, that a writ of certiorari should be granted, and that this Court should review the decision of the Court of Appeals of the District of Columbia and reverse the same.

Respectfully submitted,

HOMER HENDRICKS,
DONALD V. HUNTER,
JAMES C. SHEPPARD,
Counsel for Petitioner.

January, 1931.

APPENDIX.

UNITED STATES GEOLOGICAL SURVEY BULLETIN NO. 623, "PETROLEUM WITHDRAWALS AND RESTORATIONS AFFECTING THE PUBLIC DOMAIN," P. 440.

(TYPICAL WITHDRAWAL ORDER)

"WITHDRAWAL OF SEPTEMBER 14, 1916.

September 8, 1916.

The Honorable,
The Secretary of the Interior.

Sir:

Field investigations by the Geological Survey indicate that the lands in south-central Montana hereinafter listed contain deposits of oil and gas. As shown on the General Land Office records some of the lands within this favorable area have been patented to individuals and to the Northern Pacific Railroad Company. For that reason such patented lands and school lands in Secs. 16 and 36 are not listed in the order of withdrawal. The lands embraced in homestead entries upon which final certificates have not yet issued and unpatented railroad lands are included in the order, as they fall within the purview of the act of July 17, 1914 (38 Stat., 509). As these lands are not now in petroleum withdrawal the following order (Petroleum Reserve No. 49, Montana No. 4), involving 24,587 acres, is recommended for submission to the President for appropriate action.

Respectfully,

GEO. OTIS SMITH,
Director.

Sep-9 1916

Respectfully referred to the President with favorable recommendation.

ALEXANDER T. VOGELSANG,
Acting Secretary.

ORDER OF WITHDRAWAL

Petroleum Reserve No. 49, Montana No. 4

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847), entitled 'An act to authorize the President of the United States to make withdrawals of public lands in certain cases,' as amended by act of Congress approved August 24, 1912 (37 Stat., 497), and subject to the provisions of the act of Congress approved July 17, 1914 (38 Stat., 509), entitled 'An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals,' it is hereby ordered that the lands hereinafter described be, and the same are hereby, withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation.

(Here follows detailed description of lands withdrawn.)

WOODROW WILSON,
President.

14 September 1916."

CLERK'S COP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 704

UNITED STATES OF AMERICA EX RELATIONE ROY G. BARTON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE DEPARTMENT OF THE INTERIOR

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED FEBRUARY 3, 1931

CERTIORARI GRANTED MARCH 2, 1931

(35,626)

( )

SUPREME COURT OF THE UNITED STATES

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[fols. a & 1] [Caption omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

At Law. No: 77386

UNITED STATES OF AMERICA, ex Relatione ROY G. BARTON, Petitioner,

vs.

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Respondent

PETITION FOR MANDAMUS—Filed November 14, 1929

The petitioner, Roy G. Barton, respectfully represents to this honorable court as follows:

1. That petitioner, Roy G. Barton, is a citizen of the United States of America and a resident of the State of New Mexico.

2. That the respondent, Ray Lyman Wilbur, is a citizen of the United States and is Secretary of the Department of the Interior of the United States, and as such is sued in respect to his official capacity.

3. That the act of Congress approved February 25, 1920 (41 S. 437), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," provides in part as follows:

"That deposits of * * * oil, oil shale, or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities; * * * Provided further, That citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock

ownership, stock holding, or stock control own any interest in any lease acquired under the provisions of this act."

and in section 13 of said act of February 25, 1920, it is provided:

"Section 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and [fol. 2] regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field * * *."

4. Regulations concerning the issuance of oil and gas prospecting permits and leases, under the act of February 25, 1920, and in pursuance thereof, were duly promulgated by the Secretary of the Interior March 11, 1920, and are designated as "Department of the Interior, General Land Office Circular No. 672," in which said regulations the necessary qualifications of applicants are set forth as follows:

"1. Qualifications of Applicants.—Pursuant to section 1 of the act, permits may be issued to (a) a citizen of the United States; (b) an association of such citizens; (c) a corporation organized under the laws of the United States or of any State or Territory thereof; or (d) a municipality."

Section 4 of the aforesaid regulations, under the title "Form and contents of application," provides:

"Applications for permits should be filed in the proper district land office, addressed to the Commissioner of the General Land Office, be suspended for 30 days to enable preference-right claims to be presented before action, and after due notation then forwarded for his consideration, with a full report as to the status and conflicts. No specific form of application is required, and no blanks will be furnished, but it should cover, in substance, the following points, and be under oath:

"(a) Applicant's name and address.

"(b) Proof of citizenship of applicant, by affidavit of such fact, if native born; or if naturalized, by a certified copy of the certificate of naturalization on the form provided for use in public-land matters, unless such a copy is already on file; if a corporation, by certified copy of the articles of incorporation, and a showing as to the residence and citizenship of its stockholders; if a municipality a showing of (1) the law or charter and procedure taken by which it has become a legal body corporate; (2) that the taking of a permit or lease is authorized under such law or charter; and (3) that the action proposed has been duly authorized by the governing body of such municipality.

"(c) A statement that the applicant is not the holder of more than two other subsisting permits in the same State, nor of any permit in the same geologic structure, together with a statement of any other applications for permits in the same State, in which the applicant is directly or indirectly interested, fully disclosing the nature and extent of such interests. * * *.

"(d) Description of the land for which the permit is desired, by legal subdivisions if surveyed, and by metes and bounds if unsurveyed, in which latter case, if deemed necessary, a survey sufficient more fully to identify the land may be required before the permit is granted. In order to properly identify unsurveyed lands, great care should be taken, and if practicable the metes and bounds description should be connected by course and distance with some corner of the public-land surveys.

[fol. 3] "(e) A statement that to the best of applicant's knowledge and belief the land applied for is not within any known geological structure of a producing oil or gas field.

"(f) Three references as to applicant's reputation and business standing."

5. All of secs. 3, 10, 15 and N. W. ¼ sec. 21, T. 21 S., R. 30 E., N. M. P. M., in the State of New Mexico, being public domain of the United States was, prior to May 4, 1928, covered by oil and gas prospecting permit Las Cruces 029159, and on June 6, 1928, this oil and gas permit was ordered

canceled by the Secretary of the Interior. The cancellation was to become effective on June 6, 1928, on which date, under instructions from the General Land Office, the register of the United States land office at Las Cruces, New Mexico, was directed to receive applications for permits under the act of February 25, 1920, between the hours of 9.00 a. m. and 10.00 a. m., and in the event of there being conflicting applications, to hold a public drawing at 2.00 p. m., on said date, the successful applicant under regulations then in force being the first qualified applicant whose name was drawn.

6. On June 6, 1928, the said Roy G. Barton submitted to the said register of the United States land office at Las Cruces, New Mexico, his application duly executed, in due and proper form and complying in all respects with the regulations of the Department of the Interior regarding such permit applications, for a permit to prospect for oil and gas upon the land referred to and described as above, a copy of which application is attached hereto and made a part hereof, marked "Petitioner's Exhibit A." This application was filed in the United States land office at Las Cruces, New Mexico, on June 6, 1928, at 9.20 a. m., and there being two other conflicting applications, the application of your petitioner, Roy G. Barton, was duly placed in the drawing provided for as hereinbefore stated.

7. This applicant, Roy G. Barton, was the one whose name was first drawn in the United States land office at Las Cruces, New Mexico, under the procedure directed by the Commissioner of the General Land Office, and on June 6, 1928, the register of the United States land office at Las Cruces, New Mexico, advised the Commissioner of the General Land Office at Washington, D. C., by letter of that date as follows:

Department of the Interior, General Land Office, Las Cruces, New Mexico

June 6, 1928.

The Commissioner of the General Land Office.

SIR: Letter "N" JH of May 4, 1928, canceled oil and gas permit 029159, effective at 10 a. m., June 6, 1928.

Drawing was held at 2 p. m., this date, three applications participating—

No. 1, 038,059, Roy G. Barton.
No. 2, 038058, T. S. Plowman.
No. 3, 038057, Edward D. Tittman.

Said applications are transmitted herewith for the consideration of your office.

Respectfully, (Signed) F. B. May, Register.

[fol. 4] 8. On March 13, 1929, a telegram was forwarded to the various United States land offices, including the United States land office at Las Cruces, New Mexico, which telegram was signed by the then Commissioner of the General Land Office and approved by the Secretary of the Interior, stating and directing that—

"No oil and gas prospecting permits will be issued on and after March twelfth, nineteen twenty-nine Stop Reject all applications for oil and gas permits now pending in your office and receive no more Stop All orders for drawings hereby revoked.

"Spry, Commissioner.

"Approved:

"Ray Lyman Wilbur, Secretary."

9. On March 13, 1929, the Department of the Interior released the following memorandum for the press:

"Department of the Interior

"Memorandum for the Press

"Immediate Release, March 13, 1929

"Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending.

"These instructions are in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration.'

"Permits to prospect for oil and leases of land for its development have in the past been issued under the act of February 25, 1920. That act states 'that the Secretary of the Interior is hereby authorized under such necessity and proper rules and regulations as he may prescribe to grant to an applicant qualified under this act a prospecting permit.'

"The General Land Office in its Circular No. 672 says: 'It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant.'

"(P. N. 30582.)"

10. On September 4, 1929, decision signed by the Assistant Secretary of the Interior was made denying plaintiff right to the permit. Said decision quoted as follows:

Roy G. Barton. "N" Las Cruces 038059. Permit Application Rejected. Affirmed

Appeal from the General Land Office

On June 6, 1928, Roy G. Barton filed application for a permit under section 13 of the leasing act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon all of secs. 3, 10, 15, and N. W. ¼ sec. 21, T. 21 S., R. 30 E., N. M. be connected by course and distance with some corner of the P. M., New Mexico. Inasmuch as the cancellation of a former permit had become effective on that date and as two [fol. 5] other similar and simultaneous applications for the land had been filed, a drawing in accordance with Circular No. 929 (50 L. D. 387) and amendments was held, in which this applicant was successful.

By decision of March 26, 1929, approved by the department, the Commissioner of the General Land Office, pursuant to instructions approved by the Secretary of the Interior March 13, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929, rejected the application and closed the case.

The applicant has appealed, contending that there was no authority of law for the action taken.

At the time this application was filed and ever since March 11, 1920, paragraph 2 of the regulations approved by the Secretary under and pursuant to section 32 of the leasing act has provided—

"The granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior. * * *"

This conforms to the language of the statute, section 13, which is permissive, not mandatory. The oil-conservation policy contemplates the rejection of all permit applications, but the exception has been made that where there is filed clear and definite evidence showing substantial expenditures for reliable geological surveys or development upon the land applied for the same may be regarded as a sufficient equitable basis for allowance of applications pending on March 12, 1929, and issuance of permits thereon. But no such evidence has been presented in this case. The applicant did not by the mere filing of a prospecting-permit application acquire any right which obligates the Secretary of the Interior to issue a permit.

The drawing in which the applicant participated was held for the sole purpose of determining whose application should be given priority where more than one application was filed when the land became subject to filing permit applications. There are no facts presented in this case differentiating it, so far as allowance is concerned, from any other mere application for the issuance of a prospecting permit or license.

The rejection of the application will not be disturbed. Upon request of the applicant, and provided the Comptroller General shall approve, the drawing-service fee of $10 will be returned.

(Signed) John H. Edwards, Assistant Secretary.

11. Departmental Order No. 337 of March 16, 1929, referred to in the decision of September 4, 1929, quoted above in paragraph 10 hereof, reads as follows:

"Department of the Interior

"Memorandum for the Press

"Immediate Release, March 16, 1929

"Secretary Ray Lyman Wilbur, of the Department of the Interior, to-day issued a departmental order appoint-

ing a committee of three to pass upon outstanding permits to prospect for oil and gas on Government lands and to make recommendations as to which of those permits should be canceled. The members of that committee are the Com-
[fol. 6] missioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. The order also lays down the general policy with relation to these permits to be followed by the department. In detail it follows:

" 'The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

" 'There are more than 5,000 aplications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new aplications.

" 'Probably in none of the cases on hand has the applicant expended money for development purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.

" 'Where land covered by pending applications is likely to be drained by adjoining wells on privately owned lands, the question of granting permits on Government lands will be considered in the light of facts developed by departmental investigation.

" 'With regard to the 20,000 outstanding permits on public lands the department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry on development work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

" 'To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which

have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations.

"'Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

"'No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.'

"(Pn. N. 30656.)"

[fol. 7] 12. Section 32 of the act of February 25, 1920 (41 Stat. 436-450), reads as follows:

"That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure or oil or gas field, for the purposes of this act: Provided, That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

13. On May 3, 1929, the Department of the Interior released the following memorandum for the press:

"Department of the Interior

"Memorandum for the Press

"Immediate Release, May 3, 1929.

"In carrying out the President's oil conservation policy, the committee of the Department of the Interior for the consideration of pending claims has made a recommendation concerning possible equities in oil and gas cases where adequate geological surveys have been carried on. The recommendation, which was approved by the Secretary of the Interior, is as follows:

" 'We recommend that in all cases where clear and definite evidence is filed showing substantial expenditures for reliable geological surveys upon the lands embraced in oil and gas applications upon the same structure or where the structure is not clearly defined upon the surface, within an area not exceeding 6 miles square as provided in existing regulations, that the same be regarded as a sufficient equitable basis for the allowance of the applications pending on March 12, 1929, and issuance of permits thereon, or where permits have already issued and requests for extension are timely filed, that it be regarded as sufficient equitable ground for extension of such permits. Geological work may be distinguished from ordinary preliminary expenditures, as the latter do not operate for the benefit or enlightenment of the Government, whereas geological work supplies information which is to the advantage of and may be used by the Government in the classification and disposition of the public lands and their resources. This is to be contingent upon a showing of good faith and of responsible diligence on the part of the applicants, permittees, or those claiming through or under them.'

"(P. N. 31938.)"

14. Your relator avers that he appealed to the Secretary of the Interior from the decision of the Secretary of the Interior contained in paragraph 10 of this petition on the grounds that at the time of filing his application for oil and gas permit on June 6, 1928, his right became vested and that he claimed he was entitled to the permit in accordance with his constitutional rights as granted to him under the Constitution of the United States of America in that the deny-

ing the permit Las Cruces 038059 to him was a taking of his [fol. 8] property in the permit lands without due process of law; that it was a taking of his property without compensation and contrary to the due-process clause of the United States Constitution.

15. Your relators avers that the denial of the permit to him on his permit application 038059 is a taking of his property without due process of law and is confiscatory and is in violation of his rights under the Constitution of the United States of America. Your relator further avers that the denial of his application for permit Las Cruces serial 038059 mentioned above is contrary to the provisions of the Act of Congress, of February 25, 1920, and especially to sections 1, 13, and 32 of said act hereinabove referred to and quoted in this petition.

16. Your relator further avers that there is nothing in or under the provisions of the act of February 25, 1920 (41 Stat. 437), hereinabove referred to, which requires your relator to make any substantial expenditures for reliable geological surveys upon the lands embraced in his oil and gas application Las Cruces 038059 in order to entitle him to a permit for the lands described in said application; your relator further avers that at the time of filing said application for prospecting permit Las Cruces 038059 on March 7, 1929, or prior thereto, there was nothing in the regulations by the Secretary of the Interor, by the Commissioner of the General Land Office, or by the Director of the United States Geological Survey, issued under said act of February 25, 1920, requiring him to make any substantial expenditures for reliable geological survey upon the lands embraced in said oil and gas prospecting permit Las Cruces 038059 as a condition precedent to the issuance of the permit to him; your relator further avers that under the provisions of the act of February 25, 1920 (41 Stat. 437), hereinabove referred to, the said R. G. Barton was duly qualified under the law to receive the permit for which the said R. G. Barton applied; that he at all times stood and now stands in constant readiness, and is in fact ready, able, and willing actually, and in all respects of every kind and nature whatsoever fully completely, to comply with all the regulations made pursuant to law in respect of duties and obligations of a permittee under the act aforesaid, and

petitioner avers that the Secretary of the Interior is without authority of law to reject his application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted, and March 16, 1929, also identified as Departmental Order No. 337; that such notices, orders, and policies are contrary to the act of February 25, 1920, under which petitioner has filed his said application for prospecting permit; that the issuance of a prospecting permit to a qualified applicant is purely a ministerial duty imposed by law upon the Secretary of the Interior involving no discretion whatever in the said Secretary of the Interior; and that the only discretion that the law allows the said Secretary of the Interior is contained in section 32 of the act of February 25, 1920, which allows him only to make rules and regulations to take effect in the future to accomplish the purposes of the act and to fix the boundary of geological structures for the purposes of said act; that no press notice, policy, order, circular, or regulation of the Secretary of the Interior contrary [fol. 9] to the expressed provisions of the act of February 25, 1920, is binding upon your petitioner; that the said Order No. 337, identified as press notice of March 16, 1929, upon which was based the rejection of petitioner's application for prospecting permit, is contrary to the act of February 25, 1920, and particularly to section 1 thereof, which states that "deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided" by said act of February 25, 1920; that the word "authorized" as used in section 13 of said act of February 25, 1920, hereinabove quoted, is mandatory and not permissive; that the action of the Secretary of the Interior in denying a permit to the petitioner is arbitrary, capricious confiscatory, retroactive, and illegal.

17. The petitioner, in view of the refusal of the Secretary of the Interior to approve his application duly and properly made, for an oil and gas permit in respect to the land referred to, is without remedy in the premises unless a remedy is granted him by this honorable court commanding the Secretary of the Interior to reinstate his applica-

tion, to approve the same, and issue the permit for which application was made.

Wherefore, the premises considered, petitioner prays:

1. That a writ of mandamus be issued, directed to the respondent, Ray Lyman Wilbur, Secretary of the Interior, commanding him to reinstate the application of Roy G. Barton for oil and gas prospecting permit Las Cruces 038059, to approve the same, and to issue a prospecting permit thereon, covering the lands included in said application.

2. That all necessary writs issue.

3. That a rule issue requiring the respondent, Ray Lyman Wilbur, Secretary of the Interior, to show cause, if any he has, why a writ of mandamus may not be issued as prayed for herein.

4. That petitioner be awarded costs of court and suit money against the respondent.

5. And for such other and further rights, relief, or orders generally as the nature of the case may admit and to this honorable court may seem proper.

Roy G. Barton, Petitioner. James Conlon, Attorney for Petitioner.

Duly sworn to by Roy G. Barton. Jurat omitted in printing.

[fol. 10] EXHIBIT A TO PETITION

[Stamped:] 0355224–3. Rec'd U. S. land office, Las Cruces, N. Mex., June 6, 1928. Hour 9.50.
Fees, $32.00; Dwg., 10.00—$42.00. 038059. 2971891.

Department of the Interior, United States Land Office,
Santa Fe, New Mexico

Application for Permit to Prospect for Oil and Gas

Drawing service fee, $10.00; neither returnable nor repayable.

Las Cruces, N. M., June 6th, 1928.

To the Commissioner of the General Land Office:

The undersigned hereby applies for a permit to prospect for oil and gas under the provisions of the act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain," approved February 25, 1920, and the regulations thereunder, and as grounds for such application shows:

1. The name and address of applicant is Roy G. Barton, 322 South Ave., 60, Los Angeles, Calif.

2. Applicant is a native-born citizen of the United States and over twenty-one years of age.

3. Applicant is not the holder of and has no direct or indirect interest in any other subsisting permit, except Santa Fe, N. M., Serial No. 046462, and has no application pending for a permit except—

4. That the lands for which this permit is desired are described by legal subdivision as follows, to wit:

All sections 3, 10, 15, and N. E. ¼ sec. 20 and N. W. ¼ sec. 21 in T. 21 S., R. 30 E., 2,543.36 acres.

To the best of the applicant's knowledge and belief the land above applied for is not within any known geological structure of a producing oil and gas field.

6. Applicant gives as reference to his reputation and business standing the following persons:

William U. Tate, The Franciscan, Albuquerque, N. M.

Fred DeAugustine, 1932 N. St. Andrews Place, Los Angeles, Calif.

C. M. Goodnight, police department, Phoenix, Ariz.

7. Applicant is ready, willing, and able to furnish bond as required by the regulations of the United States Land Office.

This application is made in my interest and not in the interest of any other person, persons, company, or corporation.

(Signed) Roy G. Barton, Clmt.

Subscribed and sworn to before — this 6th June, 1928 at the U. S. general land office, Las Cruces, N. M.
F. B. May, Register.

Received in "O" June 20, 1928. G. H. G.
Recd. June 15, 1928. G. L. O.

[fol. 11] In Supreme Court of District of Columbia

Answer and Response to the Rule—Filed Nov. 27, 1929

* * * * * * *

Comes now Ray Lyman Wilbur, designated herein as the respondent, and by way of return to the rule to show cause and for answer to the petition says:

1. He admits the allegations of paragraph 1.

2. He admits the allegations of paragraph 2.

3. He admits the allegations of paragraph 3.

4. He admits the allegations of paragraph 4.

5. He admits the allegations of paragraph 5.

6. He admits the allegations of paragraph 6.

7. He admits the allegations of paragraph 7.

8. He admits the allegations of paragraph 8.

9. He admits the allegations of paragraph 9.

10. He admits the allegations of paragraph 10.

11. He admits the allegations of paragraph 11.

12. He admits the allegations of paragraph 12.

13. He admits the allegations of paragraph 13.

14. Respondent admits that the relator appealed to the Secretary of the Interior from the decision of the Commissioner of the General Land Office, rejecting the application of the relator for a permit to prospect for oil and gas on the lands therein described, alleging as grounds therefor that applicant had become possessed of some vested right en-

titling him to such permit and further alleging that the refusal to issue such permit constituted a trespass of relator's constitutional rights amounting to the "taking of his property in the permit lands without due process of law; * * * without compensation and contrary to the due process clause of the United States Constitution."

15. Respondent is advised by counsel that the allegations of paragraph 15 constitute conclusions of law which he is under no obligations either to affirm or deny.

16. Answering paragraph 16 of the petition, respondent admits that there is nothing in or under the provisions of the act of February 25, 1920 (41 Stat. 437), which requires relator to make any "substantial expenditures for reliable geological surveys" upon the lands described in his application as a condition precedent to the issuance of a permit. Respondent admits, for the purposes of this suit, that relator was duly qualified under the law to receive the permit for which he applied; that at all times relator was and is now ready, able, and willing to comply with all regulations made pursuant to the said act of Congress respecting the duties and obligations of permittee. Further answering the allegations of said paragraph 16, respondent denies that the Secretary of the Interior is without authority of law to reject the application of the relator "upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy, as set out in said press notices of March 13, 1929, herein above quoted, and March 16, 1929, also identified as Departmental Order No. 337." Further answering said paragraph 16, respondent [fol. 12] denies that the action of the Secretary of the Interior in denying a prospecting permit to the petitioner is "arbitrary, capricious, confiscatory, retroactive, and illegal." Respondent is advised that all other allegations of said paragraph constitute conclusions of law which he is under no obligation either to affirm or deny.

17. He denies the allegations of paragraph 17 preceding the prayer.

18. Further answering, respondent alleges that the administration of the act of February 25, 1920 (41 Stat. 437, section 32), is reposed in the Secretary of the Interior, with

whose authority, reasonably exercised, the courts may not interfere unless the Secretary fails, refuses, or neglects to perform a mandatory, ministerial duty imposed by the terms of the act.

19. Further answering, respondent alleges that the language of section 13 of the act is permissive, not mandatory, and has been so construed and acted upon by the Secretary of the Interior during the nine years intervening since the date of its passage.

"Sec. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be and unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which

a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit [fol. 13] for the land so identified. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby: Provided, that in the Territory of Alaska prospecting permits not more than five in number may be granted to any qualified applicant for periods not exceeding four years, actual drilling operations shall begin within two years from date of permit, and oil and gas wells shall be drilled to a depth of not less than five hundred feet, unless valuable deposits of oil or gas shall be sooner discovered, within three years from date of the permit and to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered, within four years from date of permit: Provided further, That in said Territory the applicant shall have a preference right over others to a permit for land identified by temporary monuments and notice posted on or near the same for six months following such marking and posting, and upon receiving a permit he shall mark the corners of the tract described in the permit upon the ground with substantial monuments within one year after receiving such permit."

This language plainly reposes in the Secretary of the Interior the discretion either to issue or decline to issue prospecting permits. Neither section 13 nor any other section, nor any rule or regulation promulgated in the administration of the act, vests any right in an applicant for

a permit, to receive the same. On the contrary, section 2 of the regulations issued March 11, 1920, by the Secretary of the Interior under said act of February 25, 1920, reprinted and reissued by the Secretary of the Interior October 29, 1920, in force at date of petitioner's application, and still in force, expressly provides:

"It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant."

The securing of a permit or license to prospect public lands for oil and gas is a privilege and not a right. Petitioner does not allege that he had performed any work or expended any money or other thing of value in, upon, or for the development of the land described in the application, nor that he had surrendered to the United States any claim, right, or interest in this or other lands of the United States which would constitute a legal or equitable claim or right to receive the permit applied for; neither does he disclose that any right, of whatsoever nature, has been acquired by him to receive a permit, but he simply sets forth a state of facts which indicate that he has qualified as an applicant and thus placed himself in a position to receive a permit if and when issued by the Secretary of the Interior. Further than that, he shows no acquired status involving fixed or vested rights to enter public land of the United States. The petition therefore states no ground upon which the [fol. 14] court will be justified in issuing the writ sought, commanding him either—

(a) To reinstate petitioner's application;

(b) To approve same; or

(c) To issue a prospecting permit to petitioner.

Wherefore respondent prays that the rule be discharged, the petition dismissed, and that petitioner take nothing herein; that respondent be permitted to go hence without day, with his costs.

Ray Lyman Wilbur, Secretary of the Interior.

Duly sworn to by Ray Lyman Wilbur. Jurat omitted in printing.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

OPINION—Filed April 8, 1930

* * * * * * *

The act of Congress of February 25, 1920, provides "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian Forest act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States," etc. The title of the act is "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," and its purpose is clearly to promote the prospecting for oil, gas, etc., on public lands, not theretofore known to be productive of minerals of this character. Section 13 of this act provides "That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act, a prospecting permit," etc.

The Secretary contends that Congress by the use of the word "shall" in the one case and the words "is hereby au- [fol. 15] thorized" in the other intended that the granting of permits should be wholly in the discretion of the Secretary and that he could at all times and for any reason refuse to issue permits and entirely suspend the operation of the statute. But that the purpose of the act was "that the full development of the mineral resources may be secured," was recognized in these words by the Secretary in the regulations made by him under this act (No. 3). It is true that in rule No. 2 the Secretary did provide, "It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant." It is only recently, however, that the contention has been made that under this provision the

Secretary may refuse to grant any permits at all. While it may be that the Secretary may deny individual applications "as the facts may be deemed to warrant," his discretion is not to be exercised arbitrarily and without regard to law, as is shown by the decision of the Court of Appeals in the Alling case. That the use of the words "is authorized" above does not necessarily vest him with such discretion as is claimed by him, is shown by the use of the same expression in section 32 of the act of 1920, where it is clearly mandatory. As to the effect under any construction of rule 2 it may be said that the Secretary can not add to his powers by any rule or regulation made by him.

In my opinion this act does not give the Secretary of the Interior nor the President any such power as is claimed by the Secretary. I think that the discretion vested in the Secretary is a judicial one and not an absolute one; that the word "authorized" in section 13 of the act refers to the manner of granting permits, the determination of the qualifications of the applicants, and matters of that nature under the rules and regulations promulgated by him and that the decision in the Alling case is conclusive of this question.

The authority given to him by Congress is that he may "do any and all things necessary to carry out and accomplish the purpose of this act," and not to defeat the will of Congress by suspending its operation.

Any authority then for the action by the Secretary of the Interior must be found in the act of 1910, which fixed the power of the Executive to withdraw any part of the public domain from settlement, etc. But as to this it is sufficient to say that the action of the Secretary does not constitute a withdrawal under that act. It can not be held to be such a withdrawal, for it does not appear to be of a temporary nature; the lands withdrawn are not withdrawn from either settlement, location, sale, or entry; the purpose of the withdrawal is not for any of the purposes specified in that act; these purposes are not specified in the order of withdrawal; and the withdrawal was not reported to Congress in accordance with the act. In addition, it may be said that it is by no means clear that the President has authorized the Secretary of the Interior to make the withdrawal. The latter bases his authority upon a newspaper report of a statement made by the President and does not set up any

direct order of the President to himself either orally or in writing.

[fol. 16] A writ of mandamus will issue in each case directing the Secretary of the Interior to reinstate the applications of the relators and to proceed therewith according to law.

Bailey, Justice.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

JUDGMENT—April 9, 1930

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * * * * * *

This cause came on heretofore to be heard upon the petition filed, the rule to show cause issued, and the answer of the respondent filed herein, and after being argued by attorneys of record for the respective parties was submitted to the court.

Thereupon, the same having been considered, it is adjudged and ordered that a writ of mandamus do forthwith issue in this cause directed to the Secretary of the Interior, requiring him to reinstate the application of the petitioner, Roy G. Barton, specified in this cause, and to proceed thereon according to law. Further, it is considered that petitioner recover of respondent his costs of suit, to be taxed by the clerk.

From the foregoing judgment the respondent by his said attorneys, in open court, notes an appeal to the Court of Appeals of the District of Columbia.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed Apr. 18, 1930

* * * * * * * * *

The respondent presents his assignment of errors, as follows:

1. The court erred in finding for the petitioner and aginst the respondent and in granting the writ of mandamus herein.

2. The court erred in holding that the acts of the President of the United States and of the Secretary of the Interior in the premises, together, or separately, do not constitute a temporary Executive withdrawal of the public lands subject to prospecting for oil and gas under the provisions of the act of February 25, 1920, commonly called the oil leasing act, from the purposes of said act.

3. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant.

4. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant in the absence of specific rules and regulations.

5. The court erred in holding that the provisions of the last subdivision of rule 2 of the rules and regulations do not vest in the Secretary of the Interior discretion to refuse to grant any permit in the due exercise of his official duty.

O. H. Graves, Attorney for Respondent.

[fol. 17] In Supreme Court of District of Columbia

Designation of Record—Filed April 18, 1930

* * * * * * *

The clerk in making up the transcript of record on appeal in the above-entitled cause will include:

1. Petition and exhibits.
2. Answer and exhibits.
3. Opinion and judgment of the court.
4. Notation and allowing of appeal.
5. Assignment of errors.
6. This designation.

O. H. Graves, Attorney for Respondent.

Service acknowledged this 14th day of April, 1930.

James Conlon, Attorney for Petitioner.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 18] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

vs.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLennan

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

vs.

W. B. PYRON

and No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. Moore, Commissioner of the General Land Office, Appellants,

vs.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

MINUTE ENTRIES

Tuesday, October 14, 1930.

On motion, William O. Wilson, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of the State of Wyoming.

On motion, P. Q. Nyce, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of Utah, New Mexico and Montana.

The argument in the above entitled causes was commenced by Mr. O. H. Graves, attorney for the appellants, and was continued by Mr. E. C. Finney, attorney for the appellants.

* * * * * * *

[fol. 19] [Titles omitted]

Wednesday, October 15, 1930.

The argument in the above entitled causes was continued by Mr. James Conlon, attorney for the appellant in No. 5241, and by Mr. Lewis E. Hoffman, attorney for the appellant in No. 5247, and by Mr. James G. Leovy, attorney for the appellant in No. 5250, and by William O. Wilson, Esq., Attorney General of the State of Wyoming, as amicus curiæ, and by Mr. Peter Q. Nyce, as amicus curiæ on behalf of New Mexico, Utah and Montana, and by Mr. Chester I. Long, as amicus curiæ, on behalf of the State of Colorado, and was concluded by Mr. E. C. Finney, attorney for the appellants.

* * * * * * *

[fol. 20] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

No. 5241

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Rel. ROY G. BARTON

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

OPINION—Filed Dec. 1, 1930

Mr. Justice ROBB delivered the opinion of the Court:

Appeal from a judgment in the Supreme Court of the District directing the issuance of a writ of mandamus to compel

the Secretary of the Interior "to reinstate the application of the petitioner, Roy G. Barton, * * * and to proceed thereon according to law."

Should the judgment be affirmed, it probably would result in the reinstatement of "more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices."

The cause was heard on petition and answer. There is no dispute as to the facts, which are substantially as follows: On June 6, 1928, Barton filed an application in the Land Office at Las Cruces, New Mexico, for a permit to prospect for oil and gas in a certain described tract of public land of the United States (Act of February 25, 1920; 41 Stat. 437).

On March 13, 1929, the Department of the Interior released a "Memorandum for the Press", reading in part as follows: "Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending. These instructions are in accordance with the statement issued at the [fol. 21] White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration.'"

On the same day a telegram was forwarded by the Department to the various United States land offices, including the land office at Las Cruces, New Mexico, reading in part as follows:

"No oil and gas prospecting permits will be issued on and after March 12, 1929. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked."

On March 16, 1929, Departmental Order No. 337 was issued, reading in part as follows:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department. There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the

field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications. Probably in none of the cases on hand has the applicant expended money for development purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application. * * * To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations. Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time [fol. 22] has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. * * * No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929."

This Order also was incorported in a "Memorandum for the Press" issued by the Department on the same day.

On March 26, 1929, the Commissioner of the General Land Office, "pursuant to instructions approved by the Secretary of the Interior March 13, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929, rejected" Barton's application. An appeal was taken, and the order of rejection was sustained by the Department in a decision dated September 4, 1929.

In his petition Barton avers "that there is nothing in or under the provisions of the act of February 25, 1920 (41 Stat. 437), * * * which requires your relator to make

any substantial expenditures for reliable geological surveys upon the lands embraced in his oil and gas application * * * in order to entitle him to a permit for the lands described in said application;" and that "the Secretary of the Interior is without authority of law to reject his application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted, and March 16, 1929, also identified as Departmental Order No. 337."

The answer admits, for the purposes of this suit, that Barton "was duly qualified under the law to receive the permit for which he appealed; that at all times relator (Barton) was and is now ready, able, and willing to com- [fol. 23] ply with all regulations made pursuant to the said act of Congress respecting the duties and obligations of permittee."

Did the orders of the Secretary of the Interior amount to a temporary withdrawal of the public land from location, entry, and exploration for the purpose of discovering oil or gas; and, assuming the withdrawal, did the mere filing of an application for a prospecting permit initiate a right in the applicant that could not be affected by the withdrawal?

The Act of June 25, 1910 (36 Stat. 847), "to authorize the President of the United States to make withdrawals of public lands in certain cases", reads in part as follows:

"Be it enacted * * *, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Prior to 1910 the President had acted in scores of cases without express statutory authority, and in United States v. Midwest Oil Co., 236 U. S. 459, his authority to make such withdrawals was expressly sustained.

There can be no doubt that the effect of the orders issued by the Secretary was to withdraw from further location, entry; and exploration for the discovery of oil and gas all public land, and that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest. That such was the intent of the Secretary and the understanding of the public is equally plain. It is immaterial that the orders were not limited as to time, for the Act of 1910 provides that such withdrawals or reservations shall remain in force until revoked by the President or by an Act of Congress.

The next question to be determined is whether the withdrawal of the Secretary was the withdrawal of the and [fol. 24] acts through the heads of the several departments in relation to subjects which appertain to their respective duties" (Wilcox v. Jackson, 13 Pet. 498), and that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President" (Wolsey v. Chapman, 101 U. S. 755, 769). In the case last mentioned it was held that the order of the Secretary of the Interior, directing that the lands on the Des Moines River above the Racoon Fork be reserved from sale, was in contemplation of law the order of the President and had the same effect as the proclamation mentioned in the Act of September 4, 1841 (5 Stat. 453). The Court said:

"A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we can not doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act."

See also United States v. Morrison, 240 U. S. 192; Northern Pacific Railway Co. v. Wismer, 246 U. S. 283; Relation of the President to the Executive Departments, 7 Op. Atty. Gen. 453.

In the present case the orders of the Secretary gave effect to the previously announced policy of the President, were acquiesced in by him, and were in legal contemplation his acts. Was the President vested with such authority? [fol. 25] It is not contended that the Act of June 25, 1910 (36 Stat. 847), expressly authorizing the President to make temporary withdrawal "from settlement, location, sale, or entry any of the public lands of the United States", has been repealed. The contention is that the Act of February 25, 1920 (41 Stat. 437), "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain", and providing that public lands containing deposits of such minerals "shall be subject to disposition in the form and manner provided by this Act", was mandatory, and that the President was without power to withdraw such lands from disposition as provided in the Act. Sec. 13 of that Act, relating to oil and gas, provides in part "that the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * *. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed * * *."

Sec. 14 provides in part that "upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit; * * *."

There is no provision in the Act purporting to repeal or modify the Act of 1910, and in our view such a modification may not be implied. The provision in the first section that the lands containing certain named mineral deposits "shall

be subject to disposition in the form and manner provided [fol. 26] by this Act" is general, and no more mandatory than was the provision in the Act of ~~1807 (20 Stat. 526)~~ 1872 (17 Stat. 91, R. S. 2319, 2329) declaring all public lands containing petroleum or other mineral oils to be "free and open to occupation, exploration and purchase by citizens of the United States, * * * under regulations prescribed by law"; and yet the President withdrew without direct congressional authority such public lands, and his action was sustained in the Midwest case (236 U. S. 459). But it is insisted that the Act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry", and that the application for permit and the lease which may follow discovery of oil under the Act of 1920 are not embraced within those terms. It is apparent, we think, that the Act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.

In Mason v. United States, 260 U. S. 545, by Executive order dated December 15, 1908, lands have been "withdrawn from settlement and entry, or other form of appropriation." It was contended that this order did not include appropriations by mining locations. The Court observed:

"The words 'settlement and entry', it is said, apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; that mining lands are acquired, not by settlement or entry, but by location and development; that *that* this process is not covered by the words 'other form of appropriation', limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. * * * *If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized?* (Italics ours.) None has been suggested and we can think of none. * * * Moreover, the circumstances [fol. 27] leading up to and accompanying the issuance of the order demonstrate conclusively that its main, if not its only, purpose was to preserve from private appropriation the oil and gas which the lands were thought to contain pending investigation and congressional action, and this

purpose would have been subverted by appropriations of the nature here involved quite as much as by other forms. We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order and consequently were prohibited by it."

Under the Act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease —an interest in the land. This, we think, was akin to location or entry, as used in the Act of 1910.

If, as suggested by counsel for appellee, the Act of 1910 has no application, then it well might be held that an implied power to withdraw was reposed in the President under the Act of 1920. United States v. Midwest Oil Co., 236 U. S. 459.

Under the general mining laws a citizen was free to go upon the public domain. He did the work necessary to discover minerals, staked his claim, recorded notice in the mining district or county records, and his rights became fixed. Forbes v. Gracey, 94 U. S. 762; Belk v. Meagher, 104 U. S. 279. This was true as to public lands containing oil and gas until the Act of February 25, 1920 (11 Stat. 437). Under the provisions of that Act, as already appears, a citizen no longer has a right to go upon public lands of the United States to prospect for oil or gas, unless permitted to do so by the Secretary of the Interior, under such "proper rules and regulations as he may prescribe" (Sec. 13). It is at once apparent that there is a marked distinction between the old law and the new. Under the old law [fol. 28] a citizen was free to make explorations as a matter of right. Under the new law he must apply for the privilege. Until that privilege is granted, through the issuance of a permit, he has no vested interest. It is apparent, we think, that Congress recognized the distinction between the old law and the new and that the President might at any time, if conditions changed, withdraw the public lands from exploration. Under Sec. 13 the Secretary is "authorized" to grant prospecting permits. Under Sec. 14, if a permit has been granted and the permittee has incurred the expense incident to the exploration and discovery of "valuable deposits of oil or gas", he "shall be entitled to a

lease." Thus Congress recognized that the mere filing of an application for a permit confers no vested right upon the applicant, but that if a permit be issued and he goes on the land and makes a discovery he has such an interest as must be recognized.

Congress, of course, knew that, if changed conditions rendered advisable the temporary withdrawal by the Executive of the public lands from further exploration, thousands of such applications for permits might be pending. It was careful, therefore, to distinguish between an application for a permit, and the rights that might be acquired under an issued permit. Every applicant for a permit was charged with knowledge that the Executive might temporarily withdraw the lands from further exploration, and that his application was, therefore, subject to such authority of the Executive. We rule that the order of the Secretary rejecting Barton's application for a permit was a valid exercise of power by the Executive.

Mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, to remedy and not to promote a wrong, to compel the performance of an actual duty rather than to direct the performance of an act which will work public or private mischief. While classed as a legal remedy, its issuance is largely governed [fol. 29] and controlled by equitable principles. Duncan Townsite Co. v. Lane, 245 U. S. 308; Arant v. Lane, 249 U. S. 367; Ex Parte Skinner & Eddy Corp., 265 U. S. 86; Work v. Rives, 267 U. S. 175; Payne v. United States, 50 App. D. C. 119, 269 F. 198; Morgan v. Howard, 54 App. D. C. 3, 293 F. 650; Stowell v. Deming, 57 App. D. C. 223, 19 F. (2d) 697. In the exercise of a sound judicial discretion, the court must be controlled by settled legal principles.

As observed in the Midwest case (236 U. S. 471):

"The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large."

In the present case, his orders, issued through the Secretary, were intended to meet an emergency occasioned by

the great over-production of oil and gas, the waste incident thereto, and other public considerations. There was available to him the advice of the Attorney General on all questions of law tht might be involved. It was necessary to interpret the applicable statutes, and we have expressed the view that they were correctly interpreted; but, in any event, it would require a very clear case to justify a court in arresting and suspending the action of the Executive taken in the public interest. The record does not present such a case.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

[File endorsement omitted.]

[fol. 30] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

Number 5241

DISSENTING OPINION—Filed Dec. 1, 1930

Mr. Justice VAN ORSDEL, dissenting:

I am compelled to dissent from the opinion and judgment of my associates.

It is conceded that the applicant Barton possessed all the qualifications necessary under the Leasing Act to entitle him to a permit. In other words, but for the order of the Secretary suspending the operation of the Leasing Act, he would have been compelled to grant Barton's application. We start, therefore, with an applicant entitled to a permit at the time the order was made suspending the provisions of the Leasing Act.

The Act of 1910, vesting authority in the President to withdraw public lands from "settlement, location, sale, or entry", specifically provides the terms under which this Executive authority may be exercised. It must be done by a formal proclamation, which the Secretary of the Interior is required, by the terms of the Act, to report to Congress at the next regular session after the date of withdrawal. Prior to the enactment of this statute, lands

had been withdrawn by proclamation of the President without any particular authority of statute. Congress, therefore, in the 1910 Act, manifested a clear intention to keep control of the withdrawals of public lands to the extent of specifying the manner and terms under which they could be withdrawn by the President, and in addition requiring notice to be given it of such withdrawals by the Secretary of the Interior in order that the action of the President, if deemed advisable, might be promptly revoked.

This brings us to what was done in this case. No proclamation, formal or otherwise, was ever issued by the President, and no notice of any proclamation was given Congress by the Secretary, as required by the 1910 Act. [fol. 31] The order of the Secretary, telegraphed the local land officers, was based upon the following newspaper report under date of March 12, 1929, purporting to express the views of the President:

"There will be no leases or disposal of government oil lands, no matter what category they may lie in, of government holdings or government controls, except those which may be mandatory by Congress. In other words, there will be complete conservation of government oil in this administration."

It will be observed that this merely purports to state a future policy which the President might or might not adopt in respect to government oil lands. It was not transmitted by the President to the Secretary of the Interior. The information upon which he based his order was obtained exclusively through the press. The press report merely referred to a declaration said to have been made by the President, which he could only make effective by a formal proclamation. There was, therefore, no proclamation whatever under the terms of the 1910 Act which would justify in the remotest degree the action taken by the Secretary of the Interior.

Neither can the action of the Secretary be upheld under the doctrine of acquiescence. It is undoubtedly true that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President." The President is the head of the Executive Department of the government, and the lawful acts of his subordinates will be presumed to be his acts, but this presumption does not ex-

tend to unlawful acts of subordinates. The difficulty here is that the Secretary acted without the scope of his power in the suspension of the oil leasing act. He was totally without power to act until certain statutory conditions had been complied with; namely, the issue of a proclamation by the President.

The cases relied upon in the majority opinion are not in point. In Wilcox vs. Jackson, 13 Pet. 498, a preemption [fol. 32] entry had been made upon land set aside and occupied for more than twenty years as a military reservation, on which the government had expended large sums of money under the direction of the Secretary of War. Of course, a long continued use of public land by the government itself for military purposes, or for other purposes, would constitute an occupancy by the government on its own land, amounting to a withdrawal of the land from entry and settlement; and, whether done by direct authority of the President or by the lawful act of the Secretary of War, the President, after this long lapse of time, would be assumed to have acquiesced in the withdrawal and occupation of the land.

The case of Wolsey vs. Chapman, 101 U. S. 755, has even less application to the present case than does the Wilcox case. Here, a large tract of land had been granted to the Territory of Iowa for the development of navigation on the Des Moines river. The execution of the Act was delegated to the Secretary of the Interior, and was accordingly within the lawful scope of the authority vested in him. A controversy arose as to the limits of the land granted—whether it extended beyond a point in the river known as Raccoon Fork. The matter required determination from many angles by the Department of the Interior, and, to protect the interests of all concerned, the Secretary suspended settlement on the lands in question until the matter could be legally determined. It was said, and properly so, that the act of the Department, being within the scope of its powers, would be regarded in law as the act of the President. The difference between that case and the one at bar is that here there is only one law under which a withdrawal such as we are here considering can be made; namely, through the Proclamation Act of 1910. This act is a specific grant of power by Congress to the President by which he may in his discretion withdraw public lands from entry,

sale, or settlement. Being a grant of power belonging to [fol. 33] Congress, it should strictly be complied with, and the courts will not imply compliance from circumstances such as those involved in this case.

The case of United States vs. Midwest Oil Company, 236 U. S. 459, has little or no analogy to this case. There, the proclamation of the President, issued before the enactment of the 1910 statute, hence without specific statutory authority, described accurately the territory withdrawn, the character of the land, and the object of withdrawal. The President, doubtful of his authority in the premises, submitted the whole matter to Congress for its approval. It resulted in the prompt enactment of the 1910 statute. The proclamation was prepared with all the formalities and dignity of a document promulgated by the President with a view to affecting great public and private interests. In that case the oil company entered upon the lands after the proclamation was issued. The court, in its opinion, strongly implied that if the entry upon the lands had been made prior to the issuance of the proclamation by the President, it would have had a different case. Here the application was filed prior to the order of the Secretary, and here there was no proclamation whatever as required by statute.

It is not true that the applicant was required to do nothing on the land before filing his application for a permit. He was required by the Leasing Act to seek out the location, to post notices, giving a description of the land for which application would be made,—if surveyed land, by the lines of survey; if unsurveyed, by descriptive metes and bounds. This constituted an entry upon the land, which developed into a right with the filing of the application of which the applicant cannot be divested by any act of the Executive Department. This is settled law by numerous decisions of the Supreme Court as to entry upon public lands, such as homestead, preemption, etc. Entry upon oil lands is in every respect entitled to the same legal significance as [fol. 34] entry upon lands for the purpose of acquiring title. In Macon v. United States, 260 U. S. 545, it was contended that the words "settlement and entry" applied only to the act of settling upon the soil and making entry in the land office, and that it did not apply to mining lands which it was contended were not acquired by settlement and entry but by location and development, but the court said:

"If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested and we can think of none."

This is not an action to mandamus the President. The writ runs against the Secretary of the Interior and the Commissioner of the General Land Office. The President, so far as I am able to observe, has had nothing to do with this case. The case grew out of orders originated in the Land Department, based upon newspaper rumor; and the action here is to compel the Secretary of the Interior and the Commisisoner of the General Land Office to perform purely administrative duties imposed upon them by law. That mandamus will lie for this purpose is too elementary to require citation of authority. While the judgment is to require a departmental officer to perform a purely administrative duty imposed by Congress, the court has no power under the sanction of "judicial discretion" to withhold its mandate, even though, in its judgment, to compel the enforcement might not be in the public interest. The policy of the law belongs to the legislative and not the judicial department of the government.

The court is called upon here to determine purely questions of law, and it is immaterial whether one, or five-thousand, or ten-thousand applicants would be affected by the court's decision. Neither, in the agitated state of the public mind, should the fact that this is an "Oil Case" entitle it to any particular sanctity in the eyes of the law, or [fol. 35] furnish adequate ground for the wholesale slaughter of private property rights by judicial decree. The present inquiry is limited to determining the important questions of law here involved. It would seem, therefore, unnecessary to consider the facts stressed in the majority opinion "that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest"; or that, if the judgment be affirmed in this case, "it would probably result in the reinstatement of 'more than five-thousand applications for oil and gas permits on the public lands pending in the Land Office in Washington, and an unknown number in the field offices' ".

These might furnish commendable reasons for a proper and lawful withdrawal of the lands either by formal proclamation of the President or by Act of Congress, but we have hardly reached the period where the laws of the land can be suspended or repealed by the arbitrary methods here employed.

For the reasons stated, the judgment should be affirmed.

Josiah A. Van Orsdel, Associate Justice.

[File endorsement omitted.]

[fol. 36] In Court of Appeals of District of Columbia, October Term, 1930

* * * * * * *

No. 5241

Ray Lyman Wilbur, Secretary of the Department of the Interior, Appellant,

vs.

United States of America ex Relatione Roy G. Barton

Judgment—Dec. 1, 1930

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Robb, December 1, 1930.

Mr. Justice Van Orsdel dissenting.

* * * * * * *

[fol. 37] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5241

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 15, 1930

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.
4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

James Conlon, James Conlon, Attorney for Roy G. Barton, 600 F St. N. W., Washington, D. C.

Service accepted and acknowledged this 10th day of December, 1930.

O. H. Graves, Attorney for Ray Lyman Wilbur, Secretary of the Interior, Appellant.

[File endorsement omitted.]

[fol. 38] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
FEB 3 1931
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 704

THE UNITED STATES OF AMERICA EX RELATIONE ROY G. BARTON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

JAMES CONLON,
600 F Street Northwest,
Washington, D. C.
and
CHARLES F. BREEN,
Lawrenceville, Illinois,
Counsel for Petitioner.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No.

THE UNITED STATES OF AMERICA EX RELATIONE ROY G. BARTON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, RESPONDENT.

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE YOUR HONORS:

The Petition of the United States of America Ex Relatione Roy G. Barton respectfully shows to this Honorable Court that the Writ of Certiorari should issue for the following reasons:

I.

Questions Involved, and Reasons for Allowance of Writ of Certiorari.

That this action was originally brought in the Supreme Court of the District of Columbia on November 14, 1929, Law No. 77,386, to compel the Secretary of the Interior, by writ of mandamus, to issue an oil and gas prospecting permit, under the Act of February 25, 1920 (41 Stat. 437 et seq), to Roy G. Barton, who filed application for oil and gas respecting permit on June 10, 1928 (R. pp. 13-15).

The lands covered by Roy G. Barton's application had previously been included in an oil and gas prospecting permit,

which was canceled by the Secretary of the Interior, effective June 6, 1928 (R. pp. 6-7). At a drawing held on that date, in accordance with instructions from the Secretary of the Interior, said Roy G. Barton was found to be the successful applicant (R. pp. 4-5). Said application was duly transmitted to the Commissioner of the General Land Office for consideration and issuance of permit, but by letter of March 26, 1929, addressed to the Register, District Land Office, Las Cruces, New Mexico, which letter was approved by the respondent, the Commissioner of the General Land Office, rejected said application for permit on the ground that the respondent had ordered that "no oil and gas prospecting permits will be issued after March 12, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929 (R. pp. 7-9). Thereafter said Roy G. Barton appealed to respondent, and thereafter on September 4, 1929, decision was signed by the Assistant Secretary of the Interior, affirming the prior action of the respondent and denying said Roy G. Barton's right to the permit, on the ground that the rejection was in accordance with respondent's policy announced in Departmental Order No. 337 of March 16, 1929 (R. pp. 7-9).

(7) From the decisions of Mr. Justice Bailey and Mr. Justice Siddons of the Supreme Court of the District of Columbia, ordering writs of mandamus to issue against respondent, said respondent appealed.

Petitioner brought the action above referred to and the Supreme Court of the District of Columbia, on the 14th day of November, 1929, in which case Mr. Justice Jennings Bailey of the Supreme Court of the District of Columbia, in an opinion dated April 8, 1930, directed that a writ of mandamus issue against the respondent to reinstate the applications for permit and proceed therewith according to law. Said opinion held that respondent could not defeat the will of Congress by suspending the operations of the Leasing Act and the action of respondent did not constitute a withdrawal of public lands from the filing of applications for oil and gas prospecting permit under the Act of February 25, 1920 (R. pp. 20-22).

In the cases of W. B. Pyron and Ethel M. McLennan, and R. L. Paris *vs.* Ray Lyman Wilbur, the same respondent, Mr. Justice Siddons rendered an opinion in which he directed that the writ of mandamus issue against the respondent, to compel respondent among other things to reinstate application for permit and proceed therewith according to law, holding that respondent had no authority to suspend the execution, enforcement and administration, of a constitutional Act of Congress, to wit, the Act of February 25, 1920 (41 Stat. 437).

Under Section 35 of the Leasing Act, the public land states are entitled to receive 37½ per centum of the royalties accruing to the Government from production of oil and gas in those states. Such money is to be used for the construction and maintenance of public roads, the support of public schools or public educational institutions as the various state legislatures may direct. They are also interested in taxes accruing from property used in the states in oil and gas operations and the relief from unemployment as a result of such operations; and in the development of the oil resources within the respective states.

The action of the Secretary in promulgating Orders No. 337 (R. pp. 7-9) and 338 (Exhibit "1"), in refusing to issue further oil and gas prospecting permits which may develop into leases, very vitally affects said public lands states by the elimination of royalties, taxes and employment, and delay in the development of the mineral resources of the particular states involved.

On such showing of a great public interest, the Court of Appeals allowed the States of New Mexico, Montana, Wyoming, Utah and Colorado to file briefs as amicus curiae and take part in the oral argument of these cases (R. pp. 24-25).

The above mentioned cases and several like cases were considered jointly in the Court of Appeals of the District of Columbia and on December 1, 1930, the Court rendered its decision reversing the decisions of Mr. Justice Bailey and Mr. Justice Siddons, and remanding the cause for further proceedings (R. p. 25), Mr. Justice Van Orsdel of said Court filed a dissenting opinion (R. p. 34).

II.

The importance of the questions involved in this case can not be overstated. They relate to questions of substance relating to the construction and application of Article 4, section 3, clause 2, of the Constitution of the United States of America, and of the Fifth Amendment of the Constitution, and to petitioner's right to property in the oil and gas prospecting permit, applied for which is the subject matter of this suit, and to a suspension of the Act of Congress, of February 25, 1920 (41 Stat. 437), by Orders Nos. 337 and 338, made by the Secretary of the Interior on March 16th and 20th, 1929. By said orders all pending applications for prospecting permits were rejected and all future applications were refused. They involve the authority of the Secretary of the Interior to override the Constitution of the United States and also to suspend an Act of Congress. Petitioner contends that he has no such authority either by the Constitution of the United States or the act involved or the regulations made under it.

The District Court of Appeals by its decision reversing the lower court held that the Secretary of the Interior could by promulgating Orders Nos. 337 and 338 suspend the operation of the aforesaid act of Congress of February 25, 1920, and refuse to receive, file and consider on their merits applications for oil and gas prospecting permits under said act, and in effect that such Orders could have a retroactive effect on previously acquired rights of the petitioner (R. p. 26).

III.

Another claim advanced in the argument of the case before the District Court of Appeals was that the Orders of the Secretary were in fact a withdrawal of the public lands involved, under the Act of June 25, 1910, U. S. C. A. Title 43; 36 Stat. 847-8. Petitioner contends that it was not the purpose of the Secretary to withdraw said lands under that Act, as the requirements of the Act were not complied with in any particular.

The Court of Appeals, by its decision, held that the Secretary of the Interior did withdraw the public lands of the

United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, by virtue of the power vested in the President of the United States to withdraw public lands from "settlement, location, sale or entry." (1) despite the fact that no report of such withdrawal under the Act of June 25, 1910, has been made to Congress under the terms of said act, and (2) that no proclamation, formal or otherwise, was ever issued by the President and no notice of any proclamation was given Congress by the Secretary as required by the Act of June 25, 1910 (R. p. 33).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of this Honorable Court directed to the Court of Appeals of the District of Columbia commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5241, Ray Lyman Wilbur, Secretary of the Interior, Appellant, *vs.* United States of America Ex Relatione Roy G. Barton, Appellee, and that said judgment of the Court of Appeals of the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as the nature of the case may admit and to this Honorable Court may seem meet and proper.

ROY G. BARTON,
By JAMES CONLON,
Of Counsel for Petitioner.

JAMES CONLON,
600 F St. N. W.,
Washington, D. C.
and
CHARLES F. BREEN,
Lawrenceville, Illinois,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, ss:

James Conlon, being first sworn, deposes and says, that he is Counsel for the petitioner and in the foregoing petition, that he has read same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information, and belief, and as to those matters he verily believes them to be true.

JAMES CONLON.

Subscribed and sworn to before me this 21st day of January, 1931.

JOHN R. FLETCHER,
Notary Public in and for the District of Columbia.

[NOTARIAL SEAL.]

My Commission expires February 23, 1932.

I hereby certify that I have examined the foregoing petition for certiorari, and that in my opinion it is well founded in point of law and should be granted by this Honorable Court, and that the petition is not filed for purposes of delay.

JAMES CONLON,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930

UNITED STATES OF AMERICA EX RELATIONE ROY G. BARTON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, RESPONDENT.

Brief in Support of Petition for Certiorari.

---

1. The Opinions of the Court Below.

The opinion in the Court of Appeals of the District of Columbia was rendered December 1, 1930 (R. p. 24). The opinion of the Supreme Court of the District of Columbia was rendered on April 8, 1930 (R. p. 20).

2. Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. pp. 25-40).

This court has jurisdiction under section 240 (a), Judicial Code as amended by the act of February 13, 1925, U. S. C. Title 28, Sec. 347, 43 Stat. 938.

3. Statement of the Case and Reasons Why the Writ of Certiorari Should Issue.

The statement of the case and reasons why the Writ of Certiorari should issue have been set out in the annexed petition and in the interest of brevity is not repeated here.

4. Questions Presented.

The questions involved in this case is whether the Secretary of the Interior can under the Constitution of the United States make policies suspending a Constitutional Act of

Congress, and whether he can make his policies have retroactive effect so as to deprive a person of property in an oil permit application without due process of law, and without compensation, contrary to the Fifth Amendment to the Constitution of the United States, and whether he can make retroactive regulations, and whether under Section 13 of the Oil Leasing Act he can refuse an application for prospecting permit filed under that act, without cause, not because of any disqualification of the applicant; not because the lands are not subject to issuance of prospecting permit; but because of a policy adopted by him and not by Congress; or can the Secretary of the Interior suspend an act of Congress without legislative authority.

Another question has been discussed in the briefs and opinions, to wit: That the lands were withdrawn under the act of June 25, 1910, U. S. C. Title 43, Secs. 141-3 (36 Stat. 847-8). The answer to the petition in this case does not set up the question of withdrawals. The answer was based upon the exercise of discretion by the Secretary of the Interior which he claims to possess under Section 13 of the Oil Leasing Act of February 25, 1920 (41 Stat. 437 et seq).

As to the said Act of June 25, 1910 (36 Stat. 847-8), which was held by the majority opinion of the Court of Appeals of the District of Columbia to be in force in this case (Rec. p. 25) was a general statute relating mostly to the settlement of the public lands for other than oil purposes. (Exhibit "2"), and Congress in its wisdom recognized this when it passed the Oil Leasing Act of February 25, 1920 (41 Stat. 437), otherwise the aforesaid 1920 Act was not needed at all. It is a well recognized rule of statutory construction that a later statute on a specific subject like prospecting for oil takes precedence over a general statute on the same subject (if it is the same subject) it might be the same subject in a general way, but the 1920 Act on the oil leasing subject is controlling as far as it applies and comes in ahead of and takes precedence of the 1910 Act so that the 1910 Act if in conflict with the new later specific oil leasing statute of February 25, 1920

(41 Stat. 437), is by implication repealed. This is fundamental doctrine of statutory construction.

In Swiss Nat. Ins. Co. *vs.* Miller et al., 53 App. D. C. 173; 289 Fed. 571, affirmed in 267 U. S. 42, the Court held at 53 App. D. C. 176:

> "It is elementary that, where there is in an act a specific provision relating to a particular subject, that provision must govern in respect to the subject as against general provisions in other parts of the act, although the latter standing alone, would be broad enough to include the subject to which the more particular provision relates. Endlich Interpretation of Statutes" Swiss Nat. Ins. Co. *vs.* Miller, 53 App. D. C., supra at page 176. Affirmed 267 U. S. 42.

In Adams *vs.* Woods, 2 Cranch (U. S.) 336, 2 L. Ed. 297, Chief Justice Marshall speaking for this Court on the question of specific statutes restraining general statutes said:

> "It is true that general expressions may be restrained by subsequent particular words, which show that in the intention of the legislature those general expressions are used in a particular sense: and the argument is a strong one, which contends that the latter words describing the remedy, imply a restriction on those which precede them." Adams *vs.* Woods, 2 Cranch (U. S.) 336; 2 L. Ed. 297.

In Sedgwick on Statutory and Constitutional Law at page 423 it is said: "*General words how qualified by particular words:*

> "It is a rule of right reason that general words may be qualified by particular clauses of a statute, but that on the other hand a thing which is given in particular shall not be taken away by general words." Citing Churchill *vs.* Crease, 5 Bing. N. C. 180.

5. Assignment of Errors.

The Court of Appeals of the District of Columbia erred:

1. In reversing the decision of the Supreme Court of the District of Columbia.

2. In refusing to compel the respondent Secretary of the

Interior to reinstate petitioner's application for permit and proceed therewith according to law, and issue a permit thereon.

3. In holding that the respondent Secretary of the Interior has authority to suspend or dispense with the execution, administration and enforcement of the act of Congress of February 25, 1920 (41 Stat. 437).

4. In holding that the act of the respondent Secretary of the Interior was the act of the President, even though the Secretary acted without the scope of his authority.

5. In holding that the action of the respondent Secretary of the Interior was a withdrawal of public lands under the acts of Congress of June 25, 1910 (36 Stat. 847-848), even though the terms of said act were not complied with in that the President issued no formal proclamation and the Secretary of the Interior has not transmitted to Congress a report as to said withdrawals.

6. In holding that the Secretary of the Interior had authority to make rules and regulations having a retroactive effect on prior vested rights of applicant for Oil and Gas Prospecting Permit.

CONSTITUTIONAL QUESTIONS INVOLVED.

The Constitution of the United States, Article 4, Section 3 (2) provides that:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Petitioner contends that the Secretary of the Interior is arbitrarily usurping the function of Congress by suspending the Leasing Act of February 25, 1920, 41 Stat. 437, thus denying him the Oil and Gas Prospecting Permit which is the subject matter of this suit. In support of petitioner's contention that only Congress has the right to make the kind of rules and regulations suspending an Act of Congress and in support of petitioner's claim wherein the above provision

of the Constitution of the United States has been construed, petitioner cites the cases of United States *vs.* Gratiot, 14 Pet. 526, 536, 537; United States *vs.* Fitzgerald, 15 Pet. 407; Van Brocklin *vs.* Anderson, 117 U. S. 151, 158.

Under the above provision of the Constitution of the United States the public land policies are controlled by Congress and at no time in the administration of the public lands, either in the Constitution of the United States or in any of the laws passed by Congress was it left to the Department of the Interior to create policies or to ascertain disposition of lands other than by direct authority of Congress.

Petitioner further contends that the action of the respondent, Secretary of the Interior, is also in violation of petitioner's right under the Fifth Amendment to the Constitution of the United States which provides:

> "No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation."

In view of the above Constitutional mandates it is clear that it is the duty of the respondent Secretary of the Interior to faithfully execute the policy of Congress pertaining to the issuance of Oil and Gas Prospecting Permits under Section 13 of the Leasing Act of February 25, 1920 (41 Stat. 437), as has been done for a period of over nine years. The refusal of the respondent to issue the Oil and Gas Prospecting Permit to petitioner is a taking of petitioner's property in the permit lands without due process of law; that it was a taking of his property without compensation contrary to the due process clause of the United States Constitution (Rec. pp. 10-11). That "the denial of the permit to him on his permit application 038059 is a taking of his property . . . and is confiscatory and is in violation of his rights under the Constitution of the United States of America." (Rec. pp. 10-11).

In United States *vs.* Gratiot, 14 Pet., supra, at page 537, 10 L. Ed. 578, supra, the Court said:

"the Constitution of the United States (Article four, Section three) provides:

> 'That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.' The term 'territory' as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands.' And Congress has the same power over it as over all other property belonging to the United States; and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest. . . . The disposal must be left to the discretion of Congress. . . ."

In the case of United States *vs.* Fitzgerald, 15 Pet. 407, 10 L. Ed. 785, supra, the Court construed Article 4, Section 3 of the Constitution of the United States and affirmed the judgment of the lower Court in favor of the preemption homestead entryman Fitzgerald, and said at 15 Pet. 421; 10 L. Ed. 790:

> "No appropriation of public land can be made for any purpose but by authority of Congress. . . .
>
> This Honorable Court in Van Brocklin *vs.* Anderson, supra, at 29 L. Ed. 848, held that "The Constitution creating a more perfect union and increasing powers of the National Government, expressly authorized the Congress of the United States to" . . . "dispose of and make needful rules and regulations respecting the territory and other property belonging to the United States. . . ." Van Brocklin *vs.* Anderson, 117 U. S. 151; 29 L. Ed. 845."

ARGUMENT.

THE DISCRETION OF THE SECRETARY OF THE INTERIOR IS A QUASI-JUDICIAL DISCRETION AND IS LIMITED TO THE QUESTION OF CITIZENSHIP OF APPLICANT AND FORM OF APPLICATION.

Petitioner contends first that the Secretary has no discretion under the Constitution of the United States of America, or under the Oil Leasing Act to suspend said Oil Leasing Act; second, he possesses no such discretion under Circular 672 which is the regulation under said Act. The title of the Act is "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain." From the title of the Act the policy is to promote the mining of minerals, above named, and not to discourage the mining of these minerals by suspending the operation of Section 13 of the Act.

By Section 1, deposits of oil and gas on the public domain, *shall* be subject to disposition in the form and manner provided by this Act to citizens of the United States. The lands *shall* be disposed of, a very mandatory expression, and there is no discretion left as to whether or not the Secretary desires to dispose of these lands, but it imposes on him a positive duty to dispose of them as provided in the Act.

Section 13 of the Act is as follows (R. pp. 2-11).

> "That the Secretary of the Interior is hereby *authorized*, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit." West *vs.* Alling, 58 App. D. C. 329.

It is apparent that the interpretation of Section 13, whether it is permissive or mandatory, hinges on the word "authorized." In interpreting Section 13 the entire act must be read in order to ascertain whether Congress intended the word "authorized" to mean merely permissive or mandatory upon the Secretary to issue prospecting permits.

Section 32 of the Act is as follows (R. p. 6):

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and *to do any and all things necessary to carry out and accomplish the purposes of this Act,*" etc. (Italics ours.)

It will be noted that the same word "authorized" which is used in Section 13 is also used in Section 32. If the word "authorized" is permissive and not mandatory in Section 13, then it is fair to assume that "authorized" in Section 32 is also permissive and not mandatory. Is it reasonable to suppose in construing Section 32, that Congress intended that the Secretary of the Interior may or may not prescribe the necessary rules and regulations, to do any and all things necessary to carry out and accomplish the purposes of this Act? Is it reasonable to assume that if the Secretary did not desire to prescribe any regulations to carry out the Act, he need not prescribe such regulations because the word "authorized", is interpreted by him to mean merely permissive and not mandatory? Is it reasonable to construe the word "authorized" as used in Section 32 as merely permissive and that in the place of the Secretary drawing up regulations in order to accomplish the purposes of the Act he may not do so because the word "authorized" as used in Section 32 is permissive and not mandatory? This is preposterous on the face of it. Therefore, it is fair to conclude that the word "authorized' as used in Section 32 is mandatory and not permissive. In other words, that the Secretary *shall and must* prescribe the necessary rules and regulations in order to carry out the purposes of the Act, and if the word "authorized" in Section 32 is mandatory, by no stretch of the imagination can we construe the word "authorized" in Section 13 to be permissive.

Considering the title of the Act which says its purpose is to "promote" the mining of oil and gas, Section 1, which states that the lands *shall* be subject to disposition in the form and manner provided by this Act, Section 13 which authorizes the Secretary of the Interior to issue prospecting

permits to qualified applicants, and Section 32 which authorizes the Secretary of the Interior to draw up the necessary rules and regulations in order to carry out the purposes of the Act as stated in its title and in its enacting clause, the inevitable conclusion is that the word "authorized" is mandatory and not permissive. It is true that the Secretary has a quasi-judicial, not an arbitrary, discretion to ascertain the qualifications of the applicant. These qualifications are set out in the Act. The applicant must be a citizen of the United States or an association of such persons, or a corporation organized under the laws of the United States or of any State or Territory thereof, or a municipality. The lands must not be in a producing structure of an oil or gas field. In ascertaining these qualifications, both as to persons and to the lands, the Secretary exercises a legal quasi-judicial and not an arbitrary discretion, but when this quasi-judicial discretion is exercised and he finds that the lands are not within a producing structure and that the applicant is qualified under the Act to receive a permit, his discretion ceases and a permit must issue on such application to carry out the purposes of the Act and the intent of Congress in passing it. We conclude therefore, from a study of all the pertinent clauses and sections of the Oil Leasing Act relating to these cases, that the Secretary of the Interior is compelled by law to issue permits to qualified applicants for lands not within a producing structure, and that the word "authorized" as used in Section 13 of the Act, is for all intents and purposes, mandatory and not permissive; and that such was the intent of Congress in its wisdom in passing said Leasing Act.

CIRCULAR NO. 672 (47 L. D. 437).

Circular No. 672 reported in (47 L. D. 437) is the Secretary of the Interior's regulation under the Oil Leasing Act, and the promulgation of which was authorized by Section 32 of the Act.

This circular contains among other instructions, the following paragraph:

> "It should be understood that under the Act the granting of a prospecting permit for oil and gas is dis-

> cretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirely, *as the facts may be deemed to warrant.*"

For over nine years the Department of the Interior had issued permits on applications without ever interpreting this paragraph as now interpreted. For over nine years it has been understood, and by its own action in refusing certain applications, the Department itself has invoked this paragraph by citing *facts* which prompted such rejection, as failure to show evidence of citizenship or because the lands were in a producing structure, or because the applicant applied for more acreage than he was allowed by law. Not until the present respondent Secretary of the Interior came into office has any other interpretation been given to this paragraph. Assuming, however, that the interpretation of this paragraph in circular No. 672 is a proper one, then Orders Nos. 337 and 338 are null and void because nowhere within the Act itself is the Secretary given the power to reject in whole or in part, an application for prospecting permit as he sees fit, and no regulation can amend or suspend or repeal an Act of Congress. His authority to draw up any regulation governing this Act is circumscribed by the language in Section 32, and it is inconceivable that Congress which spent nine years in considering legislation governing mining on the public domain before passing this Act, will permit anyone to destroy that legislation at will, which the Secretary has done by his Orders Nos. 337 and 338.

It is true, that he exercises a judicial or quasi-judicial discretion, as this paragraph in Circular No. 672 states, to reject in whole or in part an application for permit in individual cases "as the facts may be deemed to warrant." He is the official in whom authority is vested to determine whether or not an applicant for a permit is qualified under the law, in such matters as to determination of the citizenship of an applicant, and whether the applicant has made a sufficient application as to form for permit under the Act of Congress of February 25, 1920 (41 Stat. 437).

DEFINITION OF THE WORD "SHALL."

It is clear that the word "shall" as used in Paragraph 1 of the Oil and Gas Leasing Act of February 25, 1920 (41 Stat. 437), is mandatory and that Congress in its wisdom so intended that it should be mandatory and that it should be the duty of the Appellant, Secretary of the Interior, to issue oil and gas prospecting permits to qualified persons applying for same.

In Vol. 35 Cyc., page 1451, the word "shall" is defined as follows:

> "*SHALL.* In common parlance, a term which it is said, has always a compulsory meaning, and in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future; but it may be used in the preterit present sense of 'must,' of which it is a synonym. As used in statutes, the word is generally mandatory; although it is not always imperative but may be consistent with an exercise of discretion. Thus it may be construed to mean 'may' when no right or benefit to any one depends on its imperative use; when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual by giving it that construction; or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power, by either of the fundamental branches of government; and it also means 'may' when used by a legislature in a grant of authority to a court. It is often used in a remedial statute in a general sense including both past and future, and should be so considered when a more restricted interpretation is not required."

In Martin *vs.* Hunter's Lessee, 1 Wheat. (U. S.) 304, 329, Mr. Justice Story in delivering the opinion of the Court which gave the word *shall* a mandatory construction said:

That it was the opinion of the whole Court that the word *shall* as used in the third article of the Constitution of the United States is mandatory.

In connection with Section 13 of the Oil and Gas Leasing Act of February 25, 1920, it is clear that the word "authorize" when taken in connection with Section 1 and Section 32 of said Act, is mandatory and requires the Secretary of the Interior to consider Applications for oil and gas prospecting permits and that it does not allow him to reject applications without cause or on the strength of the policy adopted by him and not by Congress nor does Section 13 or Section 1 or Section 32 or any section of the Act of February 25, 1920, give the Secretary of the Interior the right to annul the provisions of the Act of February 25, 1920, by rejecting pending oil and gas applications for permits and thus suspending the operations of said Act of Congress.

In Volume 6, Corpus Juris, page 865, the word "authorize" is defined as follows:

> "*AUTHORIZE.* To empower; to give a right to act; to clothe with authority; to give legal power to; to approve of and formally sanction."

LAND DECISIONS.

Numerous land decisions maintain the contention of petitioner, that the Secretary does not have the discretion he claims and that these decisions recognize the *right*, not the *privilege* of an applicant who is qualified to take a permit for lands which are not in a producing structure.

In 48 Land Decisions, 98, are Instructions dated April 23, 1921, by the Secretary of the Interior.

Several applications for oil and gas permits were filed on the very first day or shortly after the passage of the said Act of February 25, 1920 (41 Stat. 437), in the State of Montana under Section 13 of the Oil Leasing Act. Because of the large number of applications involved, it took considerable time for the officials of the Land Office to consider these applications. When they finally were considered by the officials of the Land Office, it was found that the lands embraced in those applications were, since the filing of same, classified by the officials of the U. S. Geological Survey as being in what is known as the Cat Creek oil and gas produc-

ing structure. Accordingly, these applications were held for rejection because the lands were in a producing structure, and on appeal to the Secretary of the Interior, the rejection of these applications was sustained. On a Motion for Rehearing, however, the Secretary reviewed these decisions and in his instructions to the General Land Office stated as follows:

> . . . . "Applying the principle so announced, it is clear that not only equitably but legally, qualified persons who filed proper applications for oil or gas prospecting permits under the Act of February 25, 1920, *can and should not be deprived of their rights, if,* because of delay in action upon the application so filed, there intervenes a designation by this Department of the lands as being within the geological structure of a producing oil or gas field occasioned by a discovery of oil or gas subsequent to the filing of the application in the local land office." (48 L. D. 99).

This is a typical case which brings out several important points: 1. That the Secretary of the Interior recognized the right to a permit by a qualified applicant upon the filing of an application. 2. That such right is initiated at the time the application was filed and not at the time the application is considered by the officials of the General Land Office. 3. That this right is not affected by changes in the status of lands between the time the application was filed and the time that it may be considered by the officials of the General Land Office. 4. This decision clearly shows, coming as it does from the Secretary of the Interior, the kind of discretion granted him under Section 13 of the Oil Leasing Act, a discretion which he properly and judiciously used in the above quoted case: By this decision we see that the Department of the Interior has steadfastly recognized the right to an oil prospecting permit by a qualified applicant, and that the discretion given him by the Leasing Act refers only in so far as the qualifications of the applicant are concerned, and the nature of the lands involved.

Petitioner denies the authority to the respondent to make retroactive regulations, on the authority of 48 L. D. 99; supra, and of Westminster *vs.* Kline, 52 L. D. 481, wherein the Department held, at page 482, that its "instructions are not retroactive," Westminster *vs.* Kline, 52 L. D. 482.

As it is conceded by the pleadings that the petitioner filed his application for Oil and Gas Prospecting Permit which is the subject matter of this suit on June 6, 1928, (Rec. p. 13), which was more than nine months prior to the issuance of the respondent's Orders Nos. 337 and 338, it is respectfully submitted that petitioner is entitled to the permit applied for under the holding of the Interior Department in 48 L. D. 99, supra; and 52 L. D. 481, 482, supra. Other cases in support of this contention that respondent can not make retroactive rules are United States *vs.* MacDaniel, 7 Peter (U. S.) 1-14; James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597; and West *vs.* Alling, 58 App. D. C. 329, 30 Fed. (2d) 739.

In the case of United States *vs.* MacDaniel, 7 Pet. 1, 8 L. Ed. 587, the court, considering the broad powers of a department of the government to establish rules and regulations for the conduct of its business, when not in conflict with express provisions of law, said:

> "Hence, of necessity, usages have been established in every department of the government; which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a *retrospective effect, but must be limited to the future.* Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions." (Italics ours.) United States *vs.* MacDaniel, 7 Pet. 1-14, 8 L. Ed. 587.

In the case of James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597, supra, decided by Judge Sanborn, and by Circuit Judges Caldwell and Thayer, is a full and complete announcement of the law as to the power of the Secretary of the Interior to ignore existing regulations. Quoting from the syllabus, which epitomizes the law as announced in the opinion, the

court held that: "rules of practice of the Land Department formally established and promulgated by authority of the Secretary of the Interior, can be repealed or abrogated by like formal action and publication only. Decisions or opinions of the Secretary and the Commissioner in contests between claimants for specific tracts of land ignoring or violating rules neither repeal nor modify them:" James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597.

The case of West *vs.* U. S. ex rel. Alling, 58 App. D. C. 329, 30 Fed. (2d) 739, pertaining to the questions involved. The Court of Appeals of the District of Columbia held:

> "It will be observed that the Act in Section 1 expressly provides for the disposition of oil and gas land through prospecting permits and subsequent leasing 'to citizens of the United States'; and the power vested in the Secretary to establish rules and regulations for the carrying out of the Act does not imply the power to establish a rule or regulation that will conflict with an expressed provision of the Act. It follows, we think, that if the applicant sufficiently qualifies as a citizen of the United States, the Secretary is powerless to refuse such applicant a permit or to make any rule or regulation that interferes with the right of such applicant." . . . And in this case of West *vs.* Alling, the Court added: "Unquestionably, the Secretary has no power to repeal and abrogate rules and regulations of his department, but such action must have the same formal sanction that brought the rule into existence, and can not be retroactive and apply to rights acquired under the preexisting rules." West *vs.* Alling, 58 App. D. C., 329, 332; 30 Fed. (2d) 739.

From the above language of this Honorable Court in U. S. *vs.* MacDaniel, 7 Pet. 1-14, and of the decision of the U. S. Circuit Court of Appeals, Eighth judicial circuit, in James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597, and of the Court of Appeals of the District of Columbia, it will be noted that the Secretary is powerless to establish any regulation which conflicts with the expressed provision of the

Act or which are retroactive and that he has no discretion to issue or not to issue a permit to a qualified applicant. West *vs.* U. S. ex rel. Alling, supra.

WHEN PERMISSIVE WORDS ARE MANDATORY.

It has been and is well settled that even where permissive words are used, such as "may" in statutes conferring power upon public officers, without other language showing that it was intended to vest discretion, such words are to be construed as equivalent to "must" or "shall" where the statute imposes a public duty to be performed, or makes provisions for the benefit of individuals whose rights can not be effectuated without the exercise and performance of the power. Minor *vs.* Mechanics Bank, 1 Peters (U. S.) 47; Supervisors *vs.* United States, 4 Wallace (U. S.) 435.

In Supervisors *vs.* United States, *supra*, the language used in the Statute conferring authority to levy a tax to satisfy the indebtedness of the county was "may if deemed advisable." Notwithstanding the accompanying language, i. e., "if deemed advisable," it was held that the statute gave the bank the right to demand that the supervisors should exercise their powers to make a satisfaction of the indebtedness, the Court saying:

> "The conclusions to be deduced from the authorities is, that where power is given to public officers in the language of the Act before us, or in equivalent language—whenever the public interests or individual rights call for its exercise—the language used, though permissive in form is in fact peremptory. What they are empowered to do for a third person the law requires be done." . . .
>
> "In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion but to impose a positive and absolute duty." Supervisors *vs.* United States, 4 Wallace 435.

In Chase *vs.* United States, 261 Fed. 833 (8 C. C. A.) affirmed (256 U. S. 1), an Act providing for allotments to

the children of Omaha Tribe was in question. The Act stated:

> "That the Secretary of the Interior be and he is hereby *authorized* to cause to be surveyed . . . and after such survey and appraisements to sell and convey . . . all the unallotted Omaha Indian Reservation . . ."

The contention of the Secretary of the Interior in that case was that the word *authorized* allowed him to exercise discretion in determining whether or not the land should be surveyed and sold: the Court held:

> "An examination of the legislation of Congress shows that in many of the Acts of Congress the word 'authorized' is frequently used where the duty is imposed upon a public executive officer, *and in no case are the duties imposed discretionary unless, after the word 'authorized' the* other words, 'in his discretion,' are added."

In Lucas *vs.* Ensign, 4 N. Y. Leg. Obs. 142, it was held that the word "may" in a statute means "must" whenever third persons or the public have an interest in having the act done which is authorized by the use of such permissive language. Lucas *vs.* Ensign, 4 N. Y. Leg. Obs. 142. See also Editor's Note, 7 L. Ed. 47.

In the language of the Court in the Chase case, supra at page 837, it was held that a statute authorizing a public officer to do a thing imposed upon him a positive duty to do such thing which might be enforced by those for whose benefit it was to be done in the absence of words in the statute giving him discretion. Reference is there made to the case of Mason *vs.* Fearson, 9 How. 248, 258, 13 L. Ed. 130, and cases cited therein.

To the same effect are the following authorities:

Catron *vs.* Marron, 19 N. M. 200; and Springfield Milling Company *vs.* Lane County, 5 Ore. 271; and 2 Lewis Sutherland Statutory Construction, Section 636; and U. S. ex rel. Kreh *vs.* Ingham, 38 App. D. C. 379; and Cortelyou *vs.* Thorpe, 32 App. D. C. 20.

In Roberts *vs.* U. S. ex rel. Valentine, 176, U. S. 221, this Honorable Court held:

> "Unless the writ of mandamus is to become practically valueless and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, the writ should be granted. Roberts *vs.* U. S. ex rel. Valentine, 176 U. S. 221."

From an interpretation of Article 4, Section 3 (2) of the Constitution of the United States and of the Fifth Amendment of the United States Constitution, and from an interpretation of the Oil Leasing Act of February 25, 1920 (41 Stat. 437); and from an interpretation of Circular No. 672 which embodies the regulations of the Interior Department under this Leasing Act; from the Land Decisions promulgated in the Interior Department and from Court decisions, the Oil Leasing Act, and particularly Section 13 does not give the Secretary of the Interior the right to reject permit applications without cause or on the strength of a policy adopted by respondent and contrary to a policy adopted by Congress. The opinions of Justices Bailey and Siddons of the Supreme Court of the District of Columbia on the alleged authority of the Secretary to suspend the Act of February 25, 1920 (R. p. 20), are well founded and based on good sound reasoning and law as is also the dissenting opinion of Mr. Justice Van Orsdel of the Court of Appeals of the District of Columbia, in the case of Wilbur *vs.* Barton on the alleged authority of the respondent to suspend said Act of February 25, 1920 (41 Stat. 437), supra, (R. pp. 34-39).

WITHDRAWALS UNDER THE ACT OF JUNE 25, 1910 (36 Stat. 847-848).

If the Secretary does not possess the power he claims from the Oil Leasing Act itself, does he derive that power from other sources? As stated in the beginning, the question of withdrawal has no place in the consideration of this case; the question of withdrawal was not raised by respondent in his answer to the Petition in this case, but as the decision

herein complained of is based on an alleged withdrawal, it is deemed necessary to give it consideration here.

In the first place, no proclamation or withdrawal of any lands was issued by the President of the United States on March 12, 1929, or at any time since. The President did issue a statement through the press in which he stated, among other things that there will be complete conservation of Government oil in this administration. This certainly was not a legal withdrawal of lands for any purpose and it was not a proclamation bearing the signature of the President. If the President had issued a formal proclamation withdrawing *all* public lands from further filing for oil prospecting purposes, such action would not have been valid. The Constitution, Article 4, Section 3 (2), specifically provides that Congress is vested with the power to make rules respecting the public domain. However, no proclamation was ever issued withdrawing such lands. No proclamation having been issued, the Secretary is now relying on an alleged withdrawal under the Act of June 25, 1910, U. S. C. Title 43, Sections 141, 142 and 143, (36 Stat. 847-848), for convenience see copy of said Act attached hereto marked Exhibit "2," and as evidence of such withdrawals he submits a telegram of March 13, 1929, and Departmental Orders Nos. 337 and 338. This telegram was signed by Spry, the then Commissioner of the General Land Office, and approved by respondent. It is as follows:

> "No oil and gas prospecting permits will be issued on and after March Twelfth nineteen Twenty-nine Stop Reject all applications for oil and gas permits now pending in your office and receive no more Stop All orders for drawings hereby revoked"
>
> "SPRY
> *Commissioner*"
>
> "Approved:
> RAY LYMAN WILBUR
> *Secretary.*"

It is clear that this telegram is merely an instruction to the Register to reject all pending applications and refuse to

receive any further applications for permits. It does not *describe* any particular lands and does not cite any particular withdrawal. This telegram, therefore, in itself, could not be considered a withdrawal of lands. Now, if this telegram referred to is not a withdrawal, let us consider Orders Nos. 337 and 338 (R. p. 7). (Exhibit "1"). These Orders are, instructions to the Commissioner of the General Land Office and to the Registers of all local Land Offices to reject all applications then pending for oil and gas permits, and to refuse to receive any further permit applications. No withdrawal of lands made since the establishment of the Land Department was ever termed in the language of this telegram and these Orders. If a withdrawal of lands was contemplated, there is no valid reason why these Orders should not have stated that the lands were withdrawn, and give a description of the lands so withdrawn. The gist of these Orders shows clearly that the Secretary erroneously thought that he had authority despite the United States Constitution and the leasing Act of Congress to issue directions to his subordinate officers to suspend Section 13 of said Oil Leasing Act. The word "withdrawal" is not used in any of the three papers referred to, and neither are any words used from which we can infer a withdrawal of lands. These memoranda to the press which were later called Orders Nos. 337 and 338, were not withdrawals of public lands but was an arbitrary and capricious withdrawal by the Secretary from his subordinates of their power to carry into effect a Constitutional Statute enacted by Congress in its wisdom. Even an intimation of the possession of such authority by an administrative officer of the Government is unthinkable, and is diametrically opposed to American system of Government by law and not by men. Had certain described lands been withdrawn and had the lands here involved been included in such a withdrawal, then the effect of such withdrawal on the issuance of permits might form a subject of proper discussion, but a withdrawal which was never made and which as a matter of fact never had existence, certainly can not control a decision in this case at bar.

That the respondent Secretary of the Interior did not rely on any withdrawal having been made in order to sustain his action, is palpable from the decisions and published statements of the Department itself. In the decision quoted in full below in the R. L. Paris case, dated August 2, 1929, and identified in the Department as A-13784, the Secretary states:

"A-13784. August 2, 1920.

"R. L. PARIS. { "N" / Las Cruces 039906. / Permit application rejected. / Affirmed.

"Appeal From The General Land Office.

"R. L. Paris has appealed from a decision by the Commissioner of the General Land Office rejecting his oil and gas prospecting permit application, filed March 7, 1929, in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929.

"The issuance of prospecting permits for oil and gas is, under Sections 13 and 32 of the Leasing Act, discretionary with the Secretary of the Interior, and the regulations approved March 11, 1920, expressly so advise applicants. See *Joseph C. Sampson* (52 L. D.).

"The rejection of the application will not be disturbed and is hereby declared final."

It will be seen from this decision in the R. L. Paris case as well as in this Barton case at bar (R. pp. 6-7), that the reason respondent gives for the rejection of the application is not based on any withdrawal, but specifically states that under the Leasing Act and the regulations thereunder, the granting of a prospecting permit is discretionary with the Secretary of the Interior.

In another decision which was taken on appeal and identified in the Interior Department as A-13133 of Siegfried James Iverson, respondent used the exact words used in the R. L. Paris case quoted above. Not a word is mentioned about withdrawals. In the same decision the Secretary very clearly states, "the present case involves only the Leasing Act of February 25, 1920."

It is an established principle of construction that the intention of the parties creating a document such as a withdrawal, will govern the interpretation of the nature of that document, we find that by his own acts after the promulgation of Orders Nos. 337 and 338 which the majority opinion of the Court of Appeals now claims are withdrawals, the Secretary thought otherwise of them in his decisions on pending cases in the Department, for he cites the authority for issuing Orders Nos. 337 and 338 not a withdrawal of lands but the granting of discretion to him by the Act itself. Respondent has even gone further than his decision in showing his intention not to interpret these orders as withdrawals. In the Land Service Bulletins which are published monthly by the direction of the Secretary of the Interior, we find that among other things published in these Bulletins and official reports of respondent which are official, that prospecting permits have actually issued, and an additional 150 canceled oil and gas permits were reinstated, and 199 new new oil and gas prospecting permits issued, and 133 applications for oil and gas permits reinstated, making a total of 482 oil permits issued by the respondent since the issuance of Orders Nos. 337 and 338, according to respondent's report for 1930. Now, if these orders can be interpreted as withdrawals, as now claimed by appellant, how could he issue permits to some, and deny a permit to petitioner? True, he claims these cases to be exceptions inasmuch as the issuance of these permits was based on equities established by the applicants because they had submitted a geological report of the lands embraced in such applications which he claims are of benefit to the Government. But withdrawals do not recognize any exceptions except valid subsisting rights at the time the withdrawal is made, and counsel for respondent claims that the filing of an application is not a valid subsisting right, and therefore, no matter what geological reports have been filed by those who are fortunate enough to be favored by the Secretary with the issuance of permits ever since these alleged withdrawals were made, they have no greater rights than petitioner, and the Secretary was wholly

wrong in rejecting the application of petitioner or he was wholly wrong in issuing 482 oil prospecting permits to others since the issuance of Orders 337 and 338. If by these Orders the entire public domain which is believed to possess potential petroleum value, has been withdrawn, as must be the case if *any* of said lands have been so withdrawn, then none of said lands have been open to issuance of oil prospecting permits because withdrawn lands are not subject to acquisition. By the fact that the Department has issued at least 482 such permits since Orders Nos. 337 and 338 were issued proves conclusively that its action denying a permit to petitioner was not based on a question of withdrawal but on the wrongful exercise of a discretion which the Secretary erroneously thought he possessed under the Oil Leasing Act itself. Therefore, the inevitable conclusion is that no withdrawals exist of public lands as held by the majority opinion of the District Court of Appeals and the case must stand or fall on the discretion granted to him under the Act itself.

Assuming that the telegram of March 13, 1929, and Orders Nos. 337 and 338 could possibly be interpreted as withdrawals, then we must consider whether or not they comply with the requirements of the withdrawal act of June 25, 1910, U. S. C. Title 43, Sections 141-3, 36 Stat. 847-8, set out in full as Exhibit "2" annexed hereto, which act makes it imperative that a withdrawal, under this Act of June 25, 1910, must contain five elements, as follows:

1. The withdrawal must be of a temporary nature.
2. The lands withdrawn must be from settlement, location, sale or entry.
3. The lands withdrawn must be for "water power sites, irrigation, classification of lands, or other public purposes."
4. The lands to be withdrawn must be described with certainty and the purpose for which the lands are withdrawn must be specified in the order of withdrawal.
5. Such withdrawals must be reported to Congress by the Secretary of the Interior, "at the beginning of its next regular session after the date of withdrawal."

These orders did not contain any one of these five elements, and consequently, if called withdrawals, they are void as they do not comply with the Act of June 25, 1910. They are not temporary in nature because the language used in Orders Nos. 337 and 338 could not be inferred as being of a temporary nature. The word "temporary" or any other words which we can infer as being of a temporary nature, are not used in the entire Orders Nos. 337 and 338 or in the telegram to the Registers of the local Land Offices. In fact the telegram says that no permits will issue after March 12, 1929. It does not use the words "until further notice." The orders Nos. 337 and 338 use similar language.

Second, these orders do not withdraw lands from settlement, location, sale or entry. When the word "settlement" is used it means a man settling on the lands for the purpose of acquiring the right to patent under the homestead or desert land law. Chotard *vs.* Pope, 12 Wheat. 586, 6 L. Ed. 737. Also U. S. *vs.* Schurz, 102 U. S. 378, 26 L. Ed. 167. When the word "location" is used, it means the locating of lands for mineral purposes, for instance, and later acquiring patent under the placer and lode claim mining laws, Richmond Mining Co. *vs.* Rose, 114 U. S. 576, 29 L. Ed. 273. Gird *vs.* California Oil Co., 60 Fed. 532. When the word "sale" is used, it means that the lands are bought from the Government at so much per acre under the Isolated Tract laws, for instance. When the word "entry" is used, it means a homestead entry under the various homestead laws or a desert land entry or a mining entry under the old mining law. Hoglund *vs.* Lane, 244 U. S. 174. The issuance of permits does not contain any of these elements because settlement, location, sale or entry, suggests the parting of title by the Government to the lands settled, located, sold or entered, and in issuing a prospecting permit the Government not only constantly maintains title to the land but during the life of the permit and the life of the lease when issued, if a commercial discovery is made, it exercises a complete control of the operation of these lands and shares in the minerals mined under Section 14 of the Act, West *vs.* Alling, 58 App. D. C.

329. Fourth, the purpose is not stated nor is any land described in these withdrawals. The Act of June 25, 1910, contemplated a legal purpose and the creation of a policy by the Secretary of the Interior is not a legal purpose because the Constitution of the United States, Article 4, Section 3 (2), vested Congress with the power to create such policies by duly enacted legislation which it did in the passage of this specific Oil Leasing Act of February 25, 1920 (41 Stat. 437).

It does not comply with the fifth element because these Orders which are now submitted as withdrawals were not reported to Congress by the Secretary of the Interior at its next regular session.

Although the Court of Appeals in its majority decision (R. p. 25), holds that the acts of the Secretary of the Interior constituted a withdrawal of the public lands of the United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, the terms of the Act of June 25, 1910, have not been complied with in that no report of such withdrawal has been submitted to Congress.

The land applied for by petitioner is situated in Eddy County, in the State of New Mexico. The report of the respondent Secretary of the Interior to Congress for the years 1929 and 1930 do not show any withdrawals of oil lands in the State of New Mexico under the Act of June 25, 1910. (36 Stat. 847-8), or otherwise. No withdrawals were reported in the years 1929 and 1930

In other words, during 1929 when Orders Nos. 337 and 338 were promulgated which the majority opinion of the Court of Appeals of the District of Columbia construes to be a withdrawal, no additional acres of petroleum public lands were included in the reports to Congress as withdrawn under the Act of June 25, 1910. The same is true insofar as the States of California, Colorado, Montana and Utah are concerned.

The above conclusively shows that the Secretary of the Interior did not construe his acts and Orders Nos. 337 and 338 as withdrawals under the Act of Congress of June 25, 1910 (36 Stat. 847-8).

These 1929 and 1930 reports which do not include reference to the discontinuance of the granting of prospecting permits for oil and gas constitute a construction placed by the Department on the Act of June 25, 1910, which is persuasive upon the courts. These orders do not comply with any of the requirements under the withdrawal Act. See dissenting Opinion by Justice Van Orsdel, of the Court of Appeals of the District of Columbia (R. p. 34), and the Opinion of Justice Bailey on the question as to whether the Orders Nos. 337 and 338 of the Secretary of the Interior constituted a withdrawal of the public lands from prospecting for oil and gas (R. pp. 20-22), and Opinion of Justice Siddons.

UNITED STATES v. MIDWEST OIL CO., 236 U. S. 459, AND OTHER CASES.

Claim is made that if the Secretary did not possess the kind of discretion which he has exercised in these cases by virtue of the Oil Leasing Act, that the President's statement to the press, the telegram of March 13, 1929, to the local Land Offices and the Secretary's Orders Nos. 337 and 338, are not withdrawals, under the withdrawal Act of June 25, 1910, then he has a right to consider them as withdrawals by virtue of the case of United States *vs.* Midwest Oil Co., 236 U. S. 459.

Consideration of the Midwest Case shows that in 1909, President Taft was urged by the then Secretary of the Interior to make withdrawals of two tracts of lands in Wyoming and California in order to prevent the alienation of these lands, which were considered as having potential petroleum value, from being located under the old placer mining laws. President Taft withdrew these lands but he doubted his legal right to do so and in a message to Congress recommended legislation giving the President authority to make such withdrawals and validating these withdrawals of 1909. Congress refused to validate these withdrawals but instead, passed the withdrawal Act of June 25, 1910, actually limiting and circumscribing the authority of the President to make withdrawals. See Exhibit "2." The Midwest Co. entered

upon lands embraced in the withdrawal of 1909 after the lands were withdrawn. When the case reached this Honorable Court it had the question before it merely as to the 1909 withdrawals made prior to the passage of the withdrawal Act of June 25, 1910. This Court held that these withdrawals were valid in the absence of legislation, that it established a law by acquiescence in the absence of a specific Statute. But since the withdrawals considered in the Midwest case were made, Congress had spoken by the passage of the Act of June 25, 1910, and limited the power of the President to make such withdrawals, something which Congress had not done in 1909 when the withdrawals referred to in the Midwest case were made; therefore, any withdrawals made after June 25, 1910, must conform to that Act.

This has been the interpretation placed on the Act of June 25, 1909, by this Honorable Court in the majority opinion in the Midwest case, wherein this Court after reviewing the legislative history of the Act states:

> "The majority, after a review of the practice of the Department, the acquiescence of Congress in the practice and the decisions of the Courts, reported that the President already had a general power of withdrawal, and recommended the passage of the pending bill, *inasmuch as it operated to restrict the greater power already possessed.* Sen. Rep. 171 (61st Congress, 2nd Session.)" (Italics ours).

and the dissenting opinion in the *Midwest* case states that:

> ". . . only restricted authority for the future was granted in the Act of June 25, 1910."

Similarly, Departmental decisions hold that the act was intended as a limitation of the authority of the President and was not a grant of greater power. Thus, in *Utah* vs. *Lichliter* et al., 50 Land Decisions, 231, after discussing the power exercised by the President prior to the June 25, 1910, Act, held:

> "The Act of June 25, 1910 (36 Stat. 847), pursuant to which the land now involved was withdrawn, was formal Congressional recognition of this power

and was intended as a limitation thereof rather than a grant of greater authority." Citing U. S. *vs.* Midwest Oil Co., supra. (Italics ours).

Your honors' attention is called to the fact that in the very lands embraced in the 1909 withdrawals, permits under Section 13 of the Oil Leasing Act have been issued both in Wyoming and California and some of these permits have ripened into leases. When the Oil Leasing Act was passed the question arose as to whether or not the existence of these 1909 withdrawals in the States of Wyoming and California, interfered with the issuance of prospecting permits and if they did, as to whether or not the Secretary of the Interior should not recommend to the President the revocation of these withdrawals in order to give full operation of the Oil Leasing Act. This question was then considered, and it was decided by the Solicitor's office of the Interior Department that the existence of these withdrawals made by President Taft in 1909 and any other withdrawals made subsequent thereto, did not in any way interfere with the issuance of prospecting permits under the Oil Leasing Act because these withdrawals only affected such entries on public lands wherein the Government would part with the title to those lands, and did not affect prospecting permits wherein the Government constantly maintains the complete ownership and control of such lands. Permits have issued and have continued to issue to this very day on lands embraced in valid withdrawals. Therefore, even if these Orders 337 and 338, are Oil withdrawals, they would not interfere with the issuance of prospecting permits because withdrawn oil lands do not bar the issuance of prospecting permits and do not interfere with the full operation of the Oil Leasing Act.

In Lockhart *vs.* Johnson, 181 U. S. 516, it was contended that the fact that Government lands were the subject of litigation before the Court of private land claims operated to withdraw these lands generally from the operation of the mining laws. In holding that the lands were not so withdrawn, this Honorable Court said:

"Public lands belonging to the United States for whose sale or disposition Congress has made provision

> by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an Executive withdrawal under such authority expressed or implied." Lockhart *vs.* Johnson, 181 U. S. 516.

As was said by this Court in Crilly *vs.* Burrows, 17 Wallace (U. S.) 167, even where there is a casus omissus on the part of Congress, the Executive cannot supply the omission.

The provisions of the Withdrawal Act requiring the Secretary of the Interior to report withdrawals to Congress bear out the contention that valid withdrawals can be made only of particular lands, and that Congress contemplated that future withdrawals should be accomplished as in the past, to-wit, by specic Executive order describing the specific public lands to be withdrawn.

In Noyes *vs.* Mantle, 127 U. S. 348-51, the Court held:

> "The statute gives locators of mining locations the exclusive right of possession and enjoyment of all the surface included within the lines of their locations so long as they comply with the law." Noyes *vs.* Mantle, 127 U. S. 348-51.

As was said by this Court in prior cases, mandamus would become valueless as a remedial writ against defaulting public servants if it is to be denied in every case where the cry "pro bono publico" is raised.

Roberts *vs.* United States, 176 U. S. 221;
Wilbur *vs.* United States ex rel. Krushnic, 280 U. S. 306.

A judicial or legal discretion governs the issuance of the writ of mandamus, and it has been held an abuse of discretion to refuse to issue the writ where a statute regulating the matter is thereby abrogated and relator has no other adequate remedy.

U. S. ex rel. McBride *vs.* Shurz, 102 U. S. 378.

Sufficient answer to the contentions of the respondent Secretary of the Interior arises upon the mere statement of

respondent's contentions, and if anything further were needed, it might be pointed out that the obligation imposed upon executive officers to see that the laws are faithfully executed does not imply any power to forbid their execution.

Kendall *vs.* United States, 12 Pet. (U. S.) 524, 612.

While mandamus is classed as a legal remedy, in determining whether the writ should issue, Courts exercise a judicial discretion on equitable principles and in accordance with well settled rules of law.

United States *vs.* Lane, 249 U. S. 367; and
Payne *vs.* United States, 50 App. D. C. 119.

The Courts may judicially notice rules and regulations of the Executive Departments.

New York Indian Case, 170 U. S. 1.

This Court has held in Dahl *vs.* Raunheim, 132 U. S. 260, that where a person has complied with all the proceedings essential for the issue of a patent for placer mining ground, he is the equitable owner of the mining ground and the Government holds the premises in trust for him to be delivered upon the payments specified. I quote from the syllabus:

> "Being entitled to a patent, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title."
>
> Dahl *vs.* Raunheim, 132 U. S. 260.

Prior to the Act of June 25, 1910 (36 Stat. 847-8), Cabinet officers sometimes made withdrawals, but in most of those cases there was prior statutory authority therefor as in Wood *vs.* Beach, 156 U. S. 548, or else subsequent statutory ratification of the withdrawal as in Wolsey *vs.* Chapman, 101 U. S. 755, or else the President of the United States acting under statutes expressly granting such power withdrew the certain specific tract of land by proclamation after the Secretary of the Interior had purported to make a withdrawal

as in the case of United States *vs.* Morrison, 240 U. S. 192, or else possession of the land was taken over and continually used by a Government department for purposes authorized by statute, so that it might be presumed that there was an appropriation of the land as where the land is used partly for a military post and partly for lighthouse purposes for a period of approximately thirty years as in the case of Wilcox *vs.* Jackson, 13 Pet. (U. S.) 498.

Even prior to the Act of June 25, 1910 (36 Stat. 847-8), supra, the Courts held that a withdrawal could be made only of particularly described lands and that failure to describe the land invalidated the withdrawal.

Lockhart *vs.* Johnson, 181 U. S. 516, supra;
United States *vs.* McGraw, 12 Fed. 449.

In the McGraw case it was held that the attempted reservation of lands for military purposes was void on the ground that "it did not describe its boundaries or limit the amount."

Statutes should be construed so as to sustain their constitutionality and a construction which raises doubtful constitutional questions must be avoided where some other construction is open.

Missouri Pacific Ry. Co. *vs.* Boone, 270 U. S. 466;
Baender *vs.* Barnett, 255 U. S. 224;
Harriman *vs.* I. C. C., 211 U. S. 407;
U. S. ex rel. Atty. Gen. *vs.* Delaware, etc., Co., 213 U. S. 366.

It is conceded that discretionary authority may be delegated by Congress to an executive officer to the extent that he may be allowed to determine in a specific case when and how the powers legislatively conferred are to be exercised, and may establish rules and regulations not contrary to the act, fixing the manner in which the requirements of statutes are to be met.

La Coste *vs.* Department of Conservation, 263 U. S. 545;
U. S. *vs.* Grimaud, 220 U. S. 506;
Willoughby, Constitutional Law, Sec. 1077, p. 1637.

Congress may also authorize an executive officer to suspend the provisions of an act under given circumstances so long as the facts which are to determine the suspension are precisely stated by the legislature and certainly ascertained by the executive, and there is nothing involving the expediency or the just operation of such legislation left to the determination of the executive officer.

Field *vs.* Clark, 143 U. S. 649;
Butterfield *vs.* Stranahan, 192 U. S. 470.

> "The suspension of a statute is a legislative act, unless based upon some condition, contingency, exigency, or state of facts, declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body whose duty it is to execute or administer the law suspended."

Winslow *vs.* Fleischner, 112 Ore. 23, 228 P. 101, 34 A. L. R. 826.

It is submitted that if respondent's construction of the Leasing Act is to be upheld, Congress has attempted thereby to delegate to an administrative official the power to determine the policy of the law, to determine whether the policy shall be to develop and promote mining, or whether it shall be one of absolute inactivity. If the Leasing Act allows the Secretary to suspend it, the conditions, contingencies or exigencies under which this action may be taken are not defined in the statute, and it must therefore be held unconstitutional in so far as it attempts to confer any such authority.

Nor can the power of legislation be exercised by an executive officer under the guise of regulation. Congress cannot delegate to an administrative official the power to make regulations which cut down the rights given by statute.

U. S. *vs.* George, 228 U. S. 14.

> "Congress never delegated to . . . officials authority to make a regulation which cuts down substantially the rights given by the act itself. It is probable, perhaps certain, that Congress could not

delegate such substantive legislative power. See Field *vs.* Clark, 143 U. S. 649, 694."

Johnson *vs.* Keating, (C. C. A. 1) 17 F. (2d) 50, 52.

Petitioner reiterates that the Leasing Act cannot properly be construed to authorize the Secretary to refuse to consider applications for permits or to refuse by blanket order to issue any permits. Such construction would be directly contrary to the purposes of the Act in throwing public lands open to exploration and leasing in order to promote mining of the specified minerals; it would violate the express provisions of the Act by which Congress imposed upon the Secretary the duty of receiving and considering applications and issuing permits to qualified applicants; it would raise substantial doubt as to the constitutionality of the statute, if not render it repugnant to the constitution.

As stated by Mr. Justice Bailey in his opinion (R. p. 20):

"The Secretary cannot add to his powers by any rule or regulation made by him."

Respondent's construction must conform to the provisions of law before it is binding on the courts.

"A construction given by the . . . Department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. . . . It is not to be forgotten that ours is a Government of laws and not of men, and that the judicial department has imposed upon it by the Constitution, the solemn duty to interpret the laws in the last resort . . ."

United States *vs.* Dickson, 15 Pet. (U. S.) 141.

As equitable principles apply to a proceeding of this kind and as equity will contrive remedy to enforce a statute creating rights which cannot be adequately enforced at law (Joy *vs.* St. Louis, 138 U. S. 1; 21 Corpus Juris 198), so in the present case equitable principles dictate the issuance of the writ in order to prevent an irremediable wrong.

The title of the Leasing Act in question is: "An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas, and Sodium on the Public Domain," and not an Act to Authorize Exploration for Minerals. And while the title of the Act is not a part of the statute it may properly be referred to and must be given its due share of consideration in construing a statute where there is any doubt as to the legislative intent.

United States *vs.* Fisher, 2 Cranch 202; 2 L. Ed. 304;
Church of the Holy Trinity *vs.* United States, 143 U. S. 457, 36 L. Ed. 227.

I call your Honors' attention to the fact that before the Leasing Act was passed the House of Representatives entitled the bill which later became the Leasing statute, as follows:

"A bill to authorize exploration for the disposition of coal, phosphate, oil, gas, potassium or sodium."
(H. R. 3232, 65th Congress, Second Session).

And the Senate bill on this leasing statute was:

"An Act to encourage and promote the mining of coal, phosphate, oil, gas and sodium on the public domain."
(S. 2812, 65th Congress, Second Session).

Respondent cannot, under the guise of quasi-judicial discretion lawfully assert the authority to refuse to entertain any applications for oil permits any more than a court of competent jurisdiction which is given authority to exercise its jurisdiction may refuse to entertain suits.

Rex *vs.* Habering Atte Bower, 5 B. and Ald. 691.
Hudson *vs.* Parker, 156 U. S. 277;
Ex parte Brown, 116 U. S. 401;
Primos Company *vs.* Fulton Steel Company, 254 Fed. 454.

The Leasing Act was passed to promote the exploration of the public domain for oil and gas and the respondent

Secretary of the Interior may not refuse a permit to a qualified applicant even though he concluded that the Leasing Act was unwise.

West *vs.* United States ex rel. Mosier, 261 U. S. 351, 67 L. Ed. 693.

Mandamus is the proper remedy in such a case.

Work *vs.* United States ex rel. Rives, 267 U. S. 175, 69 L. Ed. 561;

Stockley *vs.* United States, 260 U. S. 532, 67 L. Ed. 390.

A withdrawal of lands from the operation of the land laws, and the withholding of a land law from public lands, are two widely different things. A withdrawal made as prescribed by law and for purposes authorized by Congress is an execution of the law and a performance of the duties of the President and his subordinates.

United States *vs.* Midwest Oil Co., 236 U. S. 459, 59 L. Ed. 673;

Chicago, M. & St. P. Ry. Co. *vs.* United States, 244 U. S. 351, 61 L. Ed. 1184;

Northern Pacific Railroad Co. *vs.* Musser-Sauntry Land, etc., Co., 168 U. S. 604, 42 L. Ed. 596;

United States *vs.* Morrison, 240 U. S. 192, 60 L. Ed. 599;

State of Utah *vs.* Work, 55 App. D. C. 372, 6 F. (2d) 675.

On the other hand, a determination by an executive officer that a certain law ought not longer to be executed is a breach of official duty, and an attempted executive repeal of an Act of Congress. Executive officers have no such powers. They must not only execute the law as they find it, but must construe the law reasonably, and so as to give effect thereto.

Work *vs.* United States ex rel. Mosier, 261 U. S. 352, 67 L. Ed. 693;

Work *vs.* United States ex rel. McAlester-Edwards Coal Co., 262 U. S. 200, 67 L. Ed. 949;

Stockley *vs.* United States, 260 U. S. 532, 67 L. Ed. 390;

Payne *vs.* Central Pacific R. Co., 255 U. S. 228, 65 L. Ed. 598;

Lane *vs.* Hoglund, 244 U. S. 174, 61 L. Ed. 1066;

Noble *vs.* Union River Logging R. Co., 147 U. S. 165, 37 L. Ed. 123.

The Act of June 25, 1910 (36 Stat. 847-8), provides that the President may withdraw and reserve lands:

> "For water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals . . ." (Exhibit "2").

It is submitted that withdrawals for "public purposes" under the Withdrawal Act may be made only for purposes of the kind specifically enumerated in the statute; that the authority to withdraw lands for these purposes refers to governmental uses necessary for the proper discharge of executive functions and does not authorize any broad exercise of power independent of an immediately intended governmental use; and that an attempted withdrawal for the general purpose of "oil conservation" therefore does not constitute a withdrawal for a public purpose within the meaning of the act.

Applying the familiar rule of statutory construction that:

> ". . . where words particularly designating specific acts or things are followed by and associated with words of general import comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated."
>
> (Lewis' Sutherland, Statutory Construction, 2nd Ed., Sec. 422).

it must be concluded that the words "or other public purposes" in the Withdrawal Act embraces only purposes which are *ejusdem generis*.

Almost uniformly, withdrawals under the Withdrawal Act have been made for specific purposes contemplating

governmental use of the land. Other withdrawals have been made for the purpose of providing military reservations (47 Land Decisions 143), Indian reservations (49 Land Decisions 592), water-power sites, reclamation projects (48 Land Decisions 85), for the purpose of permitting a resurvey of the lands (49 Land Decisions 597), in aid of proposed legislation to extend the boundaries of a national park (48 Land Decisions 279), in order to determine whether lands should be classified as mineral in character and therefore not subject to entry under the homestead laws (48 Land Decisions 283) and for other purposes.

That the Withdrawal Act did not authorize withdrawals except for immediately intended governmental use is supported by Spalding *vs.* Chandler, 160 U. S. 394. The statute under construction in that case authorized the President to make such reservations of lands within a certain land district in Michigan as he should "deem necessary for public uses" (Act of March 1, 1847, 9 Stat. 146). The Supreme Court held that this Act did not empower the President to interfere with Indian reservations existing by force of a treaty, the opinion of the court stating:

> "In the absence of express authority to set apart for public uses lands already reserved and appropriated for a particular use, we cannot infer an intention in the grant of power contained in the Act of 1847 to authorize interference with the Indian Reservation, particularly when such appropriation, as the record shows, was not made for then existing public necessities but, as the letter of General Brady set out in the statement of facts shows, was merely a provision contemplated for the possibilities of the future, both with reference to a canal and the enlargements of military works, neither of which projects had then been sanctioned by Congress.
>
> Spalding *vs.* Chandler, 160 U. S. 394."

The Department of the Interior has recognized that withdrawals must be made for governmental uses necessary to the

proper exercise of executive functions. Thus, in 47 Land Decisions 362, it is stated that:

> "From an early period in the history of the government it has been the practice of the President . . . to make withdrawals and reservations of the public land for military uses and for Indian purposes or for governmental uses rendered necessary for the proper discharge of the functions committed to the executive branch of the Government in its various departments.
>
> (Grisar *vs.* McDowell, 6 Wall., 363, 381)."

A withdrawal of lands in pursuance of an alleged oil conservation policy, it is submitted, is not a purpose of the kind enumerated in the Withdrawal Act since it does not contemplate an immediate use of the land for governmental purposes. In the words of the Chandler case, supra, it "was merely a provision contemplated for the possibilities of the future" and since not sanctioned by Congress, is invalid.

The construction of the Withdrawal Act must be strained if a withdrawal for the purpose of preventing exploration of public lands at the present time and reserving them for exploration in the future is held to be a "public purpose" within the meaning of the act.

Where the President is exercising a power not expressly or impliedly conferred upon him by the Constitution, but which has been delegated to him by Congress, the power must be personally exercised. United States *vs.* Benner, Baldwin, 24 Fed. Cas. No. 14568; 7 Op. Att. Gen. 453, 475.

Where the President is required by statute to exercise discretion, or to act judicially, he cannot delegate such authority to another, not even a cabinet officer. Truitt *vs.* United States, 38 Court of Claims 398; Mechem, Public Officers, Sec. 567, 39 Cyc. 703.

Any authority for any executive withdrawal or withholding from disposal of lands which Congress has made subject to disposition, must be derived from statutes expressly con-

ferring such authority, or from Congressional acquiescence.

U. S. *vs.* Midwest Oil Co., 236 U. S. 459;
Burfenning *vs.* Chicago, etc., R. Co., 163 U. S. 321;
U. S. *vs.* Tichenor, 12 Fed. 415, 422;
Grisar *vs.* McDowell, 6 Wall. 363;
Re Fort Boise Hay Reservation, 6 Land Decisions 16;
17 Opinions Attorney General 160.

As to the question of withdrawals in this case at bar: 1. No legal withdrawals were ever made by proclamation or otherwise. 2. If these so-called orders could possibly be interpreted as withdrawals, they are invalid because they do not comply with the withdrawal Act of June 25, 1910 (36 Stat. 847-8). 3. The Midwest decision does not apply to these cases because the withdrawals referred to in that decision were made prior to the Act of June 25, 1910. 4. Even if we admit for the purpose of this case that these Orders are withdrawals under the Midwest decision, and also under the Act of June 25, 1910, they do not affect the issuance of prospecting permits, as withdrawals of any kind do not interfere with the full operation of the Oil Leasing Act. Therefore, the inevitable conclusion is that the Opinions of Justices Bailey and Siddons, respectively, of the trial court in the Supreme Court of the District of Columbia, in granting a Writ of Mandamus on the Petition filed by petitioner an other petitioners and the dissenting opinion of Justice Van Orsdel of the Court of Appeals, is sound in law and in principle and should stand, and that the majority decision of the District Court of Appeals in this case at bar should be reversed, for the various reasons given and the various authorities submitted in support thereof.

CONCLUSION.

In conclusion it is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, in the construction of the U. S. Constitution, Article 4, Section 3 (2) and the Fifth Amendment and the Leasing Act of Congress of February 25, 1920,

in order that petitioner's application for oil and gas prospecting permit under the said Leasing Act of February 25, 1920 (41 Stat. 437), may be considered on its merits and permit issued thereon according to law, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the majority decision of two to one of the Court of Appeals of the District of Columbia, and finally reverse it, and order ultimate final judgment to be entered in this case in accordance with the decisions of Justices Van Orsdel, Bailey and Siddons, of the District of Columbia judiciary on the matter involved.

Respectfully submitted,

JAMES CONLON,
600 F St. N. W.,
Washington, D. C.
and
CHARLES F. BREEN,
Lawrenceville, Illinois,
Counsel for Petitioner.

EXHIBIT "1"

ORDER NO. 338.

UNITED STATES,
DEPARTMENT OF THE INTERIOR,

Washington, March 20, 1929.

The following outlines the general procedure in the Department of the Interior for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the Solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public inteest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to determine whether permittees have acquired equities which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing

before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights or question of similar character, they should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy, otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields where a claim of drainage is made. The special committee will consider the

question of drainage only when incidentally involved in individual permits before it for consideration

13. Permits issued and outstanding in Executive Order Indian Reservations under the Act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.

EXHIBIT "2."

Said Act of June 25, 1910, 36 Stat. 847, U. S. Code, Title 43, Section 141, provides:

> "Section 141. Withdrawal and reservation of lands for water-power sites or other purposes.—The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." (Act of June 25, 1910, c. 421, sec. 1, Stat. 847.)

While Section 142, U. S. Code, formerly Section 2 of the Act of June 25, 1910, provides:

> "That all lands withdrawn under the provisions of this Act and the preceding Section shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same applies to metalliferous minerals: Provided, That the rights of any person, who at the date of any order of withdrawal, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as the occupant or claimant shall continue in diligent prosecution of said work. *Provided further*, That this Act shall not be construed as a recognition, abridgement,

or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June 25, 1910: *And provided further,* That there shall be excepted from the force and effect of any withdrawals made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (As amended by Act of Congress, approved August 24, 1912 (37 Stat. 497).)"

While Section 3 of said Act of June 25, 1910, now Section 143, U. S. Code, provides:

"The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (Act of June 25, 1910, c. 421, Sec. 3, 36 Stat. 848.)

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 743

UNITED STATES OF AMERICA EX REL. W. B. PYRON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND C. C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1931

CERTIORARI GRANTED MARCH 2, 1931

(35,665)

(35,665)

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF DISTRICT OF COLUMBIA

At Law. No. 77631

W. B. PYRON, Petitioner,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office of the United States, Interior Building, Respondents

PETITION FOR WRIT OF MANDAMUS—Filed January 28, 1930

The petition of W. B. Pyron respectfully represents:

1

That the petitioner is and was at all times herein mentioned a citizen of the United States and a resident of Los Angeles, California, and brings this petition for a writ of mandamus against the respondents, Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office of the United States, both of whom are sued in respect of their official duties as hereinafter more particularly set forth.

2

That the respondent, Ray Lyman Wilbur as Secretary of the Interior, and the respondent C. C. Moore, as Commissioner of the General Land Office of the United States under the supervision and control of the Secretary of the Interior, are charged with the administration of the laws of the United States relative to the selling, leasing, care, and disposition of the public lands, and especially that certain act of Congress approved February 25, 1920 (41 Stat. 437).

[fol. 2] 3

That the intent and purpose of said act of February 25, 1920, as disclosed by the title thereof, is—

"* * * to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain."

And in order to give effect to the purpose thus expressed, section 1 of said act provides that—

"* * * deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, * * * shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons * * *"

and section 13 of said act provides:

"That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a prducing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed

two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so [fol. 3] identified. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby * * *"

And section 14 of said act provides:

"That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit. * * * The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production; and under such other conditions as are fixed for oil or gas leases in this act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe * * *."

And section 32 of said act provides:

"That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the

boundary lines of any structure, or oil or gas field, for the purposes of this act * * *."

And section 37 of said act provides:

"That the deposits of coal, * * * oil, oil shale, and gas, herein referred to, in lands, valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this act * * *."

4

That in carrying out and accomplishing the purposes of said act of February 25, 1920, the Secretary of the Interior on March 11, 1920, promulgated the regulations concerning oil and gas permits and leases purporting to be authorized by said act and designated as "Department of Interior, General Land Office—Circular No. 672," which regulations in prescribing the necessary qualifications of applicants for prospecting permits under said act provide that—

"* * * permits may be issued to (a) citizen of the United States; (b) an association of such citizens; (c) a corporation organized under the laws of the United States or any State or Territory thereof; or (d) a municipality."

And in setting forth the form and contents of the applications for prospecting permits provided for by section 13 of said act, provide that—

"Applications for permits should be filed in the proper district land office, addressed to the Commissioner of the General Land Office, be suspended for 30 days to enable preference-right claims to be presented before action, and after due notation then forwarded for his consideration, with a full report as to status and conflicts. No specific form of application is required, and no blanks will be fur- [fol. 4] nished, but it should cover, in substance, the following points, and be under oath:

"(a) Applicant's name and address.

"(b) Proof of citizenship of applicant, by affidavit of such fact, if native born; or if naturalized, by a certificate copy of the certificate of naturalization on the form provided for use in public-land matters, unless such a copy is

already on file; if a corporation, by certified copy of the articles of incorporation, and a showing as to the residence and citizenship of its stockholders; if a municipality a showing of (1) the law or charter and procedure taken by which it has become a legal body corporate; (2) that the taking of a permit or lease is authorized under such law or charter; and (3) that the action proposed has been duly authorized by the governing body of such municipality.

"(c) A statement that the applicant is not the holder of more than two other subsisting permits in the same State, nor of any permit in the same geologic structure, together with a statement of any other applications for permits in the same State, in which the applicant is directly or indirectly interested, fully disclosing the nature and extent of such interests. In this connection attention is directed to the limitations and exceptions of Section 27 of the act.

"(d) Description of the land for which the permit is desired, by legal subdivisions if surveyed, and by metes and bounds if unsurveyed, in which latter case, if deemed necessary, a survey sufficient more fully to identify the land may be required before the permit is granted. In order to properly identify unsurveyed lands, great care should be taken, and if practicable the meters and bounds description should be connected by course and distance with some corner of the public land surveys.

"(e) A statement that to the best of applicant's knowledge and belief the land applied for is not within any known geological structure of a producing oil or gas field.

"(f) Three references as to applicant's reputation and business standing.

"(g) If the applicant is claiming a preference right as explained in the next succeeding section of these regulations, he should set up fully the facts upon which such preference right is based, together with a true copy of the posted notice.

"(h) The applicant must furnish a bond, with qualified corporate surety, in the sum of $1,000, conditioned against the failure of the permittee to repair promptly, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation * * *."

5

That on March 20, 1929, the Secretary of the Interior issued an order, designated as "Department of the Interior Order No. 338," which stated that—

"Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits."

[fol. 5] 6

That on or about the 9th day of December, 1929, petitioner advised the register of the United States district land office at Sacramento, California, that petitioner was proposing to file with said register an application for a permit to prospect for oil and gas upon the land hereinafter described, but petitioner was advised by said register that in accordance with the Department of the Interior Order No. 338, above referred to, no applications for permits to prospect for oil and gas were being or could be received by said register and that the proposed application of the petitioner, together with the necessary fee and bond, would not be accepted for filing and would not be filed, but should be forwarded by petitioner to Washington if petitioner contemplated filing suit to compel the acceptance of said application by the Commissioner of the General Land Office of the United States; and that upon presentation to said register of the United States district land office at Sacramento, California, of an application for a permit to prospect for oil and gas upon the land hereinafter described, together with the necessary fee and bond, said register refused and still refuses to accept for filing and to file said application, fee, and bond.

7

That on the 14th day of December, 1929, petitioner presented to respondent C. C. Moore, Commissioner of the General Land Office, at his office in the city of Washington, District of Columbia, an application for a permit under that certain act of Congress approved February 25, 1920 (41 Stat. 437) for the exclusive right for the period of two (2)

years to prospect for oil and gas on the following described land situate in the county of Fresno, State of California, to wit:

Commencing at the southeast corner of section twenty-seven (27), township fifteen (15) south, range twelve (12) east, M. D. B. & M., from which a monument set in the northwest quarter (NW. ¼) of the northwest quarter (NW. ¼) of section thirty-five (35), township fifteen (15) south, range twelve (12) east, M. D. B. & M. is distant south one hundred (100) feet, east one hundred (100) feet; thence north 7,920 feet, m. o. l., to the center of the east line of section twenty-two (22); thence west 2,640 feet, m. o. l., to the center of section twenty-two (22); thence north 3,960 feet, m. o. l., to the center of the south half (S. ½) of section fifteen (15); thence west 2,640 feet, m. o. l., to the northwest corner of the southwest quarter (SW. ¼) of the southwest quarter (SW. ¼) of section fifteen (15); thence south 1,320 feet, m. o. l., to the southwest corner of section fifteen (15), thence west 2,640 feet, m. o. l., to the north quarter corner of section twenty-one (21); thence south 5,280 feet, m. o. l., to the south quarter corner of section twenty-one (21); thence west 2,640 feet, m. o. l., to the northwest corner of section twenty-eight (28); thence south 2,640 feet, m. o. l., to the west quarter corner of section twenty-eight (28); thence east 3,960 feet, m. o. l., to the southeast corner of the southwest quarter (SW. ¼) of the northeast quarter [fol. 6] (NE. ¼) of section twenty-eight (28); thence north 1,320 feet, m. o. l., to the center of the northeast quarter (NE. ¼) of section twenty-eight (28); thence east 1,320 feet, m. o. l., to the southeast corner of the northeast quarter (NE. ¼) of the northeast quarter (NE. ¼) of section twenty-eight (28); thence south 2,640 feet, m. o. l., to the southwest corner of the northwest quarter (NW. ¼) of the southwest quarter (SW. ¼) of section twenty-seven (27); thence east 1,320 feet, m. o. l., to the center of the southwest quarter (SW. ¼) of section twenty-seven (27); thence south 1,320 feet, m. o. l., to the southwest corner of the southeast quarter (SE. ¼) of the southwest quarter (SW. ¼) of section twenty-seven (27); thence west 1,320 feet, m. o. l., to the northwest corner of section thirty-four (34); thence south 2,640 feet, m. o. l., to the west quarter corner of section thirty-four (34); thence east 5,280 feet, m. o. l., to the east quarter corner of section thirty-four (34); thence south

2,640 feet, m. o. l., to the southwest corner of section thirty-five (35); thence east 2,640 feet, m. o. l., to the south quarter corner of section thirty-five (35); thence north 5,280 feet, m. o. l., to the north quarter corner of section thirty-five (35); thence west 2,640 feet, m. o. l., to the point of beginning, being the south half (S. ½) of the southwest quarter (SW. ¼) of section fifteen (15), the east half (E. ½) of section twenty-one (21), the west half (W. ½) and the southeast quarter (SE. ¼) of section twenty-two (22), all of section twenty-seven (27), except the southwest quarter (SW. ¼) of the southwest quarter (SW. ¼), the northwest quarter (NW. ¼) and the north half (N. ½) of the northeast quarter (NE ¼) and the southwest quarter (SW. ¼) of the northeast quarter (NE. ¼) of section twenty-eight (28), the north half (N. ½) of section thirty-four (34) and the west half (W. ½) of section thirty-five (35); all in township fifteen (15) south, range twelve (12) east, M. D. B. & M.

Beginning at the center of section one (1) township sixter (SW. ¼) of the northwest quarter (NW. ¼) of section one (1), township sixteen (16) south, range twelve (12) east, M. D. B. & M.; thence east 1,320 feet, m. o. l.; to the center of the northwest quarter (NW. ¼) of section one (1); thence south 1,320 feet, m. o. l., to the southeast corner of the southwest quarter (SW. ¼) of the northwest quarter (NW. ¼) of section one *one;* thence west 1,320 feet, m. o. l., to the west quarter corner of section one (1); thence north 1,320 feet, m. o. l., to the point of beginning, being the southwest quarter (SW. ¼) of the northwest quarter (NW. ¼) of section one (1), all in township sixteen (16) south, range twelve (12) east, M. D. B. & M.

Beginning at the center of section one (1), township sixteen (16) south, range twelve (12) east; thence east 1,320 feet, m. o. l., to the northeast corner of the northwest quarter (NW. ¼) of the southeast quarter (SE. ¼) of section one (1); thence south 1,320 feet, m. o. l., to the center of the southeast quarter (SE. ¼) of section one (1); thence east 1,320 feet, m. o. l., to the northeast corner of the southeast quarter (SE. ¼) of the southeast quarter (SE. ¼) of section one (1); thence south 1,320 feet, m. o. l., to the southeast corner of section one (1); thence west 2,640 feet, m. o. l., to the south quarter corner of section one (1); thence north 2,640 feet, m. o. l., to the point of beginning, being

the south half (S. ½) of the southeast quarter (SE. ¼) of the northwest quarter (NW. ¼) of the southeast [fol. 7] quarter (SE. ¼) of section one (1); township sixteen (16) south, range twelve (12) east, M. D. B. & M., containing in all 2,560 acres, m. o. l.

8

That said application contained applicant's name and address; that it contained a statement that the applicant was not the holder of any permit in the same State, nor upon the same geologic structure; a description of the land for which permit is desired, by legal subdivisions; a statement that to the best of applicant's knowledge and belief the land applied for is not within any known geological structure of a producing oil or gas field; and three references as to applicant's reputation and business standing; that a copy of said application is attached hereto, marked "Exhibit A" and made a part hereof; that all of said statements were at the same time and now are true.

9

That at the time said applicant presented said application on said 14th day of December, 1929, petitioner tendered to said respondent, the Commissioner of the General Land Office, the fee required by law, to wit, the sum of two ($2.00) dollars for each one hundred sixty (160) acres, or fraction thereof, of the land for which said application was made, the total being the total sum of thirty-two ($32.00) dollars, and a surety bond in the sum of one thousand ($1,000) dollars required by said act, but that said respondent refused, and still refuses, to accept said sum of $32.00, or any part thereof, or said bond of $1,000; that said bond was in the form required by law and the regulations of the General Land Office, on condition that if said permit should be granted that all operations should be conducted in accordance with the approved methods; that all proper precaution should be exercised to prevent waste of oil or gas developed in the lands covered thereby, or the entry of waters through wells drilled by or on behalf of the principal to the oil sand or oil-bearing strata to the destruction of the oil deposits.

10

Petitioner hereby tenders to respondents said sum of thirty-two ($32.00) dollars and said bond of one thousand ($1,000) dollars, and declares that he is at all times ready and willing to deliver same to respondents.

11

That petitioner is not now, nor was he at any of the said times, the owner or holder of any permits or interest in permits upon the same geological structure, nor any other lands of the United States situated within the State of California, and that prior to the presentation to the Commissioner of the General Land Office of the application hereinbefore referred to, no permit had been granted covering any portion of the lands herein described and no other application was of record in said office concerning the same property or any portion thereof.

[fol. 8] 12

That the respondents have failed, neglected, and refused and now refuse to accept for filing and file said application hereinbefore referred to or to grant a permit to the petitioner to prospect for oil and gas on the lands hereinbefore described; that the sole reason given by the respondents for so doing was that the respondent, Ray Lyman Wilbur, as Secretary of the Interior, has withdrawn all lands of the United States from filing for oil and gas prospecting permits.

13

Petitioner avers that, by reason of the refusal of the respondents to accept for filing and file said application for a prospecting permit, he has been deprived of the rights accorded him by the Congress of the United States under the act of February 25, 1920 (41 Stat. 437); that under the provisions of said act of February 25, 1920, petitioner at all times referred to herein was and still is entitled to file an application for, and to have issued to him, a permit to prospect on the lands hereinabove referred to; that under the provisions of said act of February 25, 1920, the Secretary of the Interior is required to accept for filing and to file said application and to issue to petitioner a permit to

prospect on the lands named in said application; that petitioner at all times referred to herein was and still is duly qualified under the provisions of said act of February 25, 1920, to receive the permit applied for; that petitioner at all times has stood and now stands in readiness, and is in fact ready, able, and willing actually and in all respects fully and completely to comply with all the regulations made pursuant to law in respect of duties and obligations of an applicant for a permit and a permittee under the said act of February 25, 1920; that under the act of February 25, 1920, the acceptance for filing and the filing of a duly executed application for a permit to prospect upon public lands subject to disposition under said act, and the issuance to a qualified applicant of a permit to prospect upon such lands when called upon to do so, are purely ministerial duties imposed upon the Secretary of the Interior; that the only discretion allowed the Secretary of the Interior by said act of February 25, 1920, is in the prescribing of rules and regulations which are necessary and proper to carry out and accomplish the purposes of said act, and to fix and determine the boundary lines of any structure or oil or gas field for the purposes of said act; that the word "authorized" as used in section 13 of said act of February 25, 1920, is mandatory and not permissive; that the said Department of the Interior Order No. 338, upon which was based the refusal to accept petitioner's application for a prospecting permit, and the rejection thereof, is contrary to said act of February 25, 1920, and particularly to sections 1 and 13 thereof; that the Secretary of the Interior is without authority under the act of February 25, 1920, to refuse to receive applications for, and to discontinue the granting of permits to prospect on public lands provided for by said act; that the Secretary of the Interior is without authority under the act of February 25, 1920, to refuse to receive or to reject petitioner's application upon [fol. 9] any ground, and especially upon the ground alleged that, in accordance with said Department of the Interior Order No. 338, no applications for permits will be received after March 12, 1929; that any order, rule, or regulation of the Secretary of the Interior instructing the Commissioner of the General Land Office not to receive applications for permits to prospect upon public lands under the act of

February 25, 1920, is invalid and not binding upon petitioner; that said Department of the Interior Order No. 338 is not a necessary or proper rule or regulation authorized by section 32 of said act of February 25, 1920, and does not in any manner carry out or accomplish the purposes of said act, but is contrary to and in conflict with the expressed purpose of the act, which is "to promote the mining of * * * oil, oil shale, gas, and sodium on the public domain"; that the action of the Secretary of the Interior and the Commissioner of the General Land Office in refusing to receive petitioner's application for a permit and in refusing to issue to petitioner a permit to prospect upon the land described in said application, is unreasonable, arbitrary, capricious, and illegal.

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That petitioner has no plain, speedy, or adequate remedy at law or in equity to correct the error committed by the respondents unless remedy is granted by this honorable court.

Wherefore, the petitioner prays:

First. That a rule be granted by this honorable court requiring Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office of the United States, to show cause, by a day to be therein named, why they should not be commanded by a writ of mandamus to accept for filing and to file the petitioner's application hereinbefore referred to and to accept said fee of $32.00, and said bond in the sum of $1,000.00, and thereafter, if no other applicant is found entitled to a preference right thereto, to issue to the petitioner a permit to prospect for oil and gas on the land in said application and herein described.

Second. That a writ of mandamus be granted by this honorable court commanding Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office of the United States, to accept for filing and file the petitioner's application hereinbefore referred to and to accept said fee of $32.00, and said bond in the sum of $1,000.00 and therefore, if no other applicant is found entitled to a preference right thereto, to issue to the peti-

tioner a permit to prospect for oil and gas on the land in said application and herein described.

A. W. Gregg, Weston Vernon, Jr., John W. Fisher,
Attorneys for Petitioner.

Duly sworn to by W. B. Pyron. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION—Filed January 28, 1930

Los Angeles, Calif., December 9, 1929.

To the Hon. Commissioner of the General Land Office,
Washington, D. C.

DEAR SIR: W. B. Pyron hereby applies for a permit under that certain act of Congress of February 25, 1920, Public, 146, for the exclusive right for the period of two (2) years to prospect for oil and gas upon the following-described land situate in the county of Fresno, State of California, or so much thereof as may be public land, to wit:

Commencing at the southeast corner of section twenty-seven (27), township fifteen (15) south, range twelve (12) east, M. D. B. & M., from which a monument set in the northwest quarter (NW. ¼) of the northwest quarter (NW. ¼) of section thirty-five (35), township fifteen (15) south, range twelve (12) east, M. D. B. & M. is distant south one hundred (100) feet, east one hundred (100) feet; thence north 7,920 feet, m. o. l., to the center of the east line of section twenty-two (22); thence west 2,640", m. o. l., to the center of section twenty-two (22); thence north 3,960 feet, m. o. l., to the center of the south half (S. ½) of section fifteen (15); thence west 2,640 feet, m. o. l., to the northwest corner of the southwest quarter (SW. ¼) of the southwest quarter (SW. ¼) of section fifteen (15); thence south 1,320 feet, m. o. l., to the southwest corner of section fifteen (15); thence west 2,640 feet, m. o. l., to the north quarter corner of section twenty-one (21); thence south 5,280 feet, m. o. l., to the south quarter corner of section twenty-one (21); thence west 2,640 feet, m. o. l., to the northwest corner of section twenty-eight (28); thence south 2,640 feet, m. o. l., to the west quarter corner of section twenty-eight (28); thence east 3,960 feet, m. o. l., to the southeast corner of

the southwest quarter (SW. ¼) of the northeast quarter (NE. ¼) of section twenty-eight (28); thence north 1,320 feet, m. o. l., to the center of the northeast quarter (NE. ¼) of section twenty-eight (28); thence east 1,320 feet, m. o. l., to the southeast corner of the northeast quarter (NE. ¼) of the northeast quarter (NE. ¼) of section twenty-eight (28); thence south 2,640 feet, m. o. l., to the southwest corner of the northwest quarter (NW. ¼) of the southwest quarter (SW. ¼) of section twenty-seven (27); thence east 1,320 feet, m. o. l., to the the center of the southwest quarter (SW. ¼) of section twenty-seven (27); thence south 1,320 feet, m. o. l., to the southwest corner of the southeast quarter (SE. ¼) of the southwest quarter (SW. ¼) of section twenty-seven (27); thence west 1,320 feet, m. o. l., to the northwest corner of section thirty-four (34); thence south 2,640 feet, m. o. l., to the west quarter corner of sec- [fol. 11] tion thirty-four (34); thence east 5,280 feet, m. o. l., to the east quarter corner of section thirty-four (34); thence south 2,640 feet, m. o. l., to the southwest corner of section thirty-five (35); thence east 2,640 feet, m. o. l., to the south quarter corner of section thirty-five (35); thence north 5,280 feet, m. o. l., to the north quarter corner of section thirty-five (35); thence east 2,640 feet, m. o. l., to the point of beginning, being the south half (S. ½) of the southwest quarter (SW. ¼) of section fifteen (15), the east half (E. ½) of section twenty-one (21), the west half (W. ½) and the southeast quarter (SE. ¼) of section twenty-two (22), all of section twenty-seven (27) except the southwest quarter (SW. ¼) of the southwest quarter (SW. ¼), the northwest quarter (NW. ¼) and the north half (N. ½) of the northeast quarter (NE. ¼) and the southwest quarter (SW. ¼) of the northeast quarter (NE. ¼) of section twenty-eight (28), the north half (N. ½) of section thirty-four (34) and the west half (W. ½) of section thirty-five (35); all in township fifteen (15) south, range twelve (12) east, M. D. B. & M.

Beginning at the northwest corner of the southwest quarter (SW. ¼) of the northwest quarter (NW. ¼) of section one (1), township sixteen (16) south, range twelve (12) east, M. D. B. & M.; thence east 1,320 feet, m. o. l., to the center of the northwest quarter (NW. ¼) of section one (1); thence south 1,320 feet, m. o. l., to the southeast corner of the southwest quarter (SW. ¼) of the northwest quarter

(NW. ¼) of section one; thence west 1,320 feet, m. o. l., to the west quarter corner of section one (1); thence north 1,320 feet, m. o. l., to the point of beginning, being the southwest quarter (SW. ¼) of the northwest quarter (NW. ¼) of section one (1), all in township sixteen (16) south, range twelve (12) east, M. D. B. & M.

Beginning at the center of section one (1); township sixteen (16) south, range twelve (12) east; thence east 1,320 feet, m. o. l., to the northeast corner of the northwest quarter (NW. ¼) of the southeast quarter (SE. ¼) of section one (1); thence south 1,320 feet, m. o. l., to the center of the southeast quarter (SE. ¼) of section one (1); thence east 1,320 feet, m. o. l., to the northeast corner of the southeast quarter (SE. ¼) of the southeast quarter (SE. ¼) of section one (1); thence south 1,320 feet, m. o. l., to the southeast corner of section one (1); thence west 2,640 feet, m. o. l., to the south quarter corner of section one (1); thence north 2,640 feet, m. o. l., to the point of beginning, being the south half (S. ½) of the southeast quarter (SE. ¼) and the northwest quarter (NW. ¼) of the southeast quarter (SE. ¼) of section one (1), township sixteen (16) south, range twelve (12) east, M. D. B. & M., containing in all 2,560 acres, m. o. l.

and in support of said application states:

That applicant is a native-born citizen of the United States, a resident of the city of Los Angeles, California; his business address, 1221 Subway Terminal Building, Los Angeles, California.

That applicant does not own or hold, nor is he interested in any permit or lease for oil or gas on the same geological structure upon which is situated the lands hereby applied for, nor is it interested in any other pemit for lease in the State of California.

[fol. 12] That to the best of applicant's knowledge and belief the land applied for is not within any known geological structure of a producing oil or gas field.

That according to the best knowledge and belief of geologists of applicant, the land so described is favorable for prospecting for oil and gas because of formations in character similar to formations in which oil is produced in other districts.

It is the intention of applicant to explore said tract by drilling wells at such place or places which may be adjudged most advantageous by his geologists, and that he will show due diligence in said work of exploration.

That your applicant has been engaged in the business of prospecting and developing oil lands for more than twenty (20) years, and, in the event a permit is granted, has ample capital available with which to sink a well on said premises any depth necessary in order to properly explore and develop said premises.

That three references as to applicant's reputation and business standing are:

Security-First National Bank of Los Angeles, 7th and Spring Streets, Los Angeles, California.

F. C. Elsey, vice president, Kern County Land Company, 910 American Bank Building, San Francisco, California.

H. H. Welsh, attorney, Chandler-Rowell Building, Fresno, California.

In evidence of his good faith and in compliance with the rules and regulations, applicant is accompanying this application with a surety bond in the sum of one thousand ($1,000) dollars, and the sum of twenty-eight ($28.00) dollars in currency of the United States, being $2.00 for each one hundred sixty (160) acres or fraction of land for which a permit is requested.

Wherefore, your applicant respectfully requests that your department issue to him a permit to prospect said land for oil and gas under the terms of "An act to promote the mining of coal phosphate, oil, oil shale, gas, and sodium on the public domain," and known as Public 146, 66th Congress, approved February 25, 1920.

W. B. Pyron.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. B. Pyron, being first duly sworn, deposes and says:

That he is the applicant in the foregoing application; that he has read the said application and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on applicant's in-

formation and belief, and as to such matters so stated on information and belief that he believes it to be true.

W. B. Pyron.

Subscribed and sworn to before me this 9th day of December, 1929. Rosa Kaskel, Notary Public in and for the County of Los Angeles, State of California, and residing therein. (Seal.)

[fol. 13] Affidavit of Citizenship

STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. B. Pyron, being first duly sworn, deposes and says: That he is the applicant in the foregoing attached application for an oil and gas permit; that he is a native-born citizen of the United States of America and a resident of the State of California.

W. B. Pyron.

Subscribed and sworn to before me this 10th day of December. 1929. Rosa Kaskel, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDED ANSWER AND RESPONSE TO THE RULE—Filed Feb. 28, 1930

* * * * * * *

Come now Ray Lyman Wilbur and C. C. Moore, designated herein as respondents, and by way of return to the rule to show cause and for their joint answer to the petition say as follows:

1. They admit the allegations of paragraph 1.

2. They admit the allegations of paragraph 2.

3. They admit that the portion of paragraph 3 quoted from section 1 of the act of February 25, 1920, is to be

found in said section; that the excerpts quoted from sections 13, 14, 32, and 37 appear in the corresponding sections of the act. The intent and purpose of the act, however, are questions of law to be ascertained by a consideration of the entire act and in connection herewith, are not questions to be determined by the respondents. The allegation of the petitioner therefore as to the intent and purpose thereof is neither affirmed nor denied by respondents.

4—5. They admit the allegations of paragraphs 4 and 5.

6. Because they have no personal knowledge of the facts upon which the allegations of paragraph 6 are based, respondents are unable to admit them as detailed, and, therefore, deny all of such allegations not herein specifically admitted. They specifically admit that Order No. 338 was issued as alleged, and that the register of the land office at Sacramento, California, in compliance therewith received no applications for permits to prospect for oil and gas on public lands after March 12, 1929, the date named therein.

7. They admit the allegations of paragraph 7.

8. They admit that the statements were contained in said application as alleged, but inasmuch as they made no exami- [fol. 14] nation of the facts necessary to ascertain the truth thereof, they are without knowledge of the truth thereof, either then or now, and are, therefore, unable either to affirm or deny them.

9. They admit the allegations of paragraph 9.

10. Paragraph 10 contains no allegations which require an answer by respondents.

11. They admit the allegations of paragraph 11.

12. Respondents deny each and every allegation in paragraph 12 except such as are by this answer specifically admitted. They admit that the application of petitioner was not received for filing by the Commissioner of the General Land Office and was returned by him to the attorneys for petitioner who had transmitted the same to him, by his office letter of December 16, 1929, a copy of which is attached hereto as Exhibit A and is made a part hereof. That such action was taken by him because of the general policy of the President of the United States to conserve oil and gas

on public lands, as outlined in the orders of the Secretary of the Interior Nos. 337 and 338, copies of which are hereto attached as Exhibits B and C, and each of them are made a part hereof. That by virtue of and pursuant to the aforesaid administrative policy to conserve the oil and gas on public lands of the United States, it was no part of the official duty of the respondents, or either of them, or of the register of the land office at Sacramento, California, to receive and file petitioner's application, as the legal effect of the action of the Secretary of the Interior aforesaid in effectuating the same had operated temporarily to withdraw the public lands of the United States containing oil and gas, from further prospecting for and development of such minerals.

13. Respondents deny all and singular the material allegations of paragraph 13 of the petition. Said paragraph contains many assumptions and conclusions of law which respondents are advised by counsel they are not called upon to respond, and as to such allegations they neither affirm nor deny them.

14. Respondents deny all and singular the allegations of paragraph 14.

15. Further answering, respondents allege that the administration of the act of February 25, 1920 (41 Stat. 437, section 32), is reposed in the Secretary of the Interior, with whose authority, reasonably exercised, the courts may not interfere unless the Secretary fails, refuses, or neglects to perform a mandatory, ministerial duty imposed by the terms of the act.

16. Further answering, respondents allege that the language of section 13 of the act is permissive, not mandatory and has been so construed and acted upon by the Secretary of the Interior during the nine years intervening since the date of its passage. Its context plainly reposes in the Secretary of the Interior the discretion either to issue or decline to issue prospecting permits. Neither section 13 nor any other section, nor any rule or regulation promulgated in the administration of the act, vests any right in an applicant for a permit, to receive the same. On the contrary, section 2 of the regulations issued March 11, 1920, by the Secretary of the Interior under said act of February

25, 1920, reprinted and reissued by the Secretary of the Interior October 29, 1920, in force at date of petitioner's application, and still in force, expressly provides:

[fol. 15] "It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant."

The securing of a permit or license to prospect public lands for oil and gas is a privilege and not a right. Petitioner does not allege that he had performed any work or expended any money or other thing of value in, upon, or for the development of the land described in the application, nor that he had surrendered to the United States any claim, right, or interest in this or other lands of the United States which would constitute a legal or equitable claim or right to receive a permit; neither does he disclose that any right, of whatsoever nature, has been acquired by him to receive a permit, but he *is* simply sets forth a state of facts which indicate that he is qualified as an applicant and has thus placed himself in a position to apply for and receive a permit if and when issued by the Secretary of the Interior. Further than that, he shows no acquired status involving fixed or vested rights to enter public land of the United States. The petition therefore states no ground upon which the court will be justified in issuing the writ sought.

Wherefore, respondents pray that the rule be discharged, the petition dismissed, and that petitioner take nothing herein; that respondents be permitted to go hence without day, with their costs.

Ray Lyman Wilbur, Secretary of the Interior.
(Signed) C. C. Moore, Commissioner, General Land Office.

Duly sworn to by Ray Lyman Wilbur and C. C. Moore. Jurats omitted in printing.

[fol. 16] EXHIBIT "A" TO AMENDED ANSWER

December 16, 1929.

"A"CAO.

Returning application for permit to prospect for oil and gas.

Messrs. Dunnington, Walker, Gregg & Gregg, Investment Building, Washington, D. C.

GENTLEMEN: Reference is had to your letter of December 14, 1929, transmitting as attorneys for W. B. Pyron, of Los Angeles, California, an application to prospect for oil and gas on certain lands in Fresno County, California, under the act of February 25, 1920 (41 Stat. 437), together with a $1,000 surety bond executed by Pyron and the National Surety Company.

By telegram of March 13, 1929, to the registers of the district land offices, approved by the Secretary of the Interior, they were directed to refuse any oil and gas applications for permit filed after March 12, 1929, and in departmental order No. 338, issued March 20, 1929, it was stated therein (paragraph 7) that:

"Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929."

You informally advised this office that similar or same application had been presented to the district land office and had been refused, and for that reason was left in this office. At the same time you tendered a fee of $32.00, the acceptance of which was verbally refused.

The instructions referred to, while directed to the registers of the district land offices, apply equally to this office and to the department, and in accordance therewith the application and bond are herewith returned to you having been made of record in this office.

Very respectfully, (Signed) C. C. Moore, Commissioner.

EXHIBIT B TO AMENDED ANSWER

Order No. 337

United States Department of the Interior, Washington

March 16, 1929.

The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.

Probably in none of the cases on hand has the applicant expended money for developmental purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.

Where land covered by pending applications is likely to be drained by adjoining wells on privately owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.

[fol. 17] With regard to the 20,000 outstanding permits on public lands, the department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should

be recognized and to make appropriate recommendations.

Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.

(Signed) Ray Lyman Wilbur, Secretary.

EXHIBIT C TO AMENDED ANSWER

Order No. 338

United States Department of the Interior, Washington

March 20, 1929.

The following outlines the general procedure in the Department of the Interior for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their [fol. 18] permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

6. The departmental committee, consisting of the solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to determine whether permittees have acquired equities which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly: Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda

of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights, or questions of similar character, they should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy; otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields where a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration.

[fol. 19] 13. Permits issued and outstanding in Executive order Indian reservations under the act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

Ray Lyman Wilbur, Secretary of the Interior.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM—Filed Apr. 15, 1930

On Submission After Final Hearing

* * * * * * *

The above-entitled case, together with the cases of McLennan v. Wilbur, No. 76795; Retherford v. Wilbur, No. 76911 and Paris v. Wilbur, No. 77213 were submitted for

final hearing. A waiver of a jury trial has been filed and the oral testimony of one witness has been heard in the instant case. In the three other cases referred to no issues of fact are involved.

These four cases present the same question and it is primarily a question of law. Similar cases involving the same question had previously been heard and submitted to Mr. Justice Bailey, and on April 8th, last, he filed an opinion in the two cases submitted to him, in which he held that the writ of mandamus should issue directing the Secretary of the Interior to reinstate the applications of the relators and to proceed therewith according to law. In that opinion the writer of the present memorandum concurs, both in its reasoning and in the conclusions reached by the learned justice.

This memorandum is to be taken as applying to all of the four cases submitted to him, as stated above. The writer desires now, in a few sentences, to emphasize certain phases of the matter.

The act of Congress, which is invoked by the relators in the pending cases, was approved February 25, 1920, and, as pointed out by Justice Bailey in his opinion, the act is entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." We are only concerned now with those provisions of the act which deal with oil and gas permits.

The act authorizes the Secretary of the Interior to promulgate necessary and proper rules and regulations to govern in the execution of the statute. (Section 32.) Pursuant thereto the Secretary promulgated oil and gas regulations under date of March 11, 1920. These regulations occupy some twenty-five printed pages, and there has also been published by the Secretary, in the form of an appendix to his regulations, a digest of opinions and decisions in connection with the administration of the act of Congress mentioned, as applied to oil and gas. This appendix was approved by the Secretary of the Interior under date of October 6, 1920, and contains thirteen printed pages. We find in regulation No. 3 language in substance to the effect that the granting of a permit or lease for the development or production of oil or gas will not preclude other permits or leases of the same land for the mining of other minerals under the act, "all to the end that the full development of

the mineral resources may be secured." On page 36 of the [fol. 20] appendix, above mentioned, we find it again declared, in effect, that the purpose of the act was "to the end that the best development of the lands, both for mineral and agricultural purposes, may be accomplished." We thus have constructions by the Secretary of the Interior of the purpose of the legislation in question, that it is that the full development of the mineral resources may be secured.

With scrupulous care the act reserves certain lands from its operation by "excluding lands acquired under the act known as the Appalachian Forest Act, approved March 1, 1911 (36 Statutes, 961), and those in national parks, and in land withdrawn or reserved for military or naval uses or purposes, except as herein provided." (Section 1.) It enacts that the act shall operate upon deposits of oil, oil shale, or gas, and lands containing such deposits owned by the United States including those in national forests.

The duty of executing the provisions of this act is conferred upon the Secretary of the Interior; and nowhere in the act, in the opinion of the court, is any power to suspend its operation or dispense with its execution conferred upon him. And this court is further of the opinion that no power resides in either the executive or judicial branches of the Government to suspend or dispense with the execution, administration, and enforcement of a constitutionally enacted law of the Congress.

In each of the four cases mentioned above the writ of mandamus will issue, in the McLennan, Retherford, and Paris cases, directing the Secretary of the Interior to reinstate the applications of relators and proceed therewith according to law, and the Pyron case directing the Secretary of the Interior to accept for filing and file the application of relator and proceed therewith according to law.

Orders accordingly will be settled and signed on presentation and notice.

F. L. Siddons, Justice.

April 15, 1930.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

JUDGMENT—April 19, 1930

Session resumed pursuant to adjournment, Hon. F. L. Siddons, justice, presiding.

* * * * * * *

This cause came on to be heard at this term upon the petition filed, the rule to show cause issued, the answer of respondents filed herein, and the oral testimony presented to the court by a witness for petitioner, upon waiver of trial by jury, and after being argued by attorneys of record for the respective parties was submitted to the court. Thereupon, the same having been considered, it is this 19th day of April, 1930, adjudged and ordered that a writ of mandamus do forthwith issue in this cause directed to the Secretary of the Interior and the Commissioner of the General Land Office of the United States, requiring them to accept for filing and to file the application of the petitioner, W. B. Pyron, specified in this cause, and to proceed therewith according to law.

[fol. 21] Further it is considered that petitioner recover of the respondents his costs of suit, to be taxed by the clerk.

From the foregoing judgment, the respondents, by their attorneys, in open court, note an appeal to the Court of Appeals of the District of Columbia, which is by the court allowed.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

STIPULATION RE EVIDENCE, ETC.—Filed May 29, 1930

It is stipulated by Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, respondents, by their attorneys, E. C. Finney and O. H. Graves, and W. B. Pyron, petitioner, by his attorneys, James G. Leovy, A. W. Gregg, Weston Vernon, jr., and John W. Fisher, that on February 28, 1930, at the hearing in the above-entitled cause before Mr. Justice Siddons, trial by jury having been waived by the parties of

record by written stipulation, James G. Leovy testified on behalf of the petitioner in substance as follows:

That on the 9th day of December, 1929, W. B. Pyron, appellee, through his attorney, James G. Leovy, advised the register of the United States district land office at Sacramento, California, by telephone, that said W. B. Pyron was proposing to file with said register an application for a permit to prospect for oil and gas upon the land described in paragraph 7 of the petition for writ of mandamus herein and incorporated in the transcript of record in this case on appeal.

That said register at said time advised said James G. Leovy that in accordance with Department of the Interior Order No. 338, no applications for permits to prospect for oil and gas on public lands were being or could be received by said register, and that the said proposed application of said W. B. Pyron would not be accepted for filing and would not be filed, nor would the accompanying fee and bond be accepted or filed, but said application, fee, and bond would be returned to said W. B. Pyron without acknowledgment of their receipt and without any record of their receipt having been made upon the books or records of the said district land office.

That said James G. Leovy, advised the said register that he proposed to institute legal proceedings to compel the acceptance of said application, fee, and bond, and was advised by said register that if such proceedings were contemplated the matter of filing said application, fee, and bond should be taken up with proper officials of the Department of the Interior at Washington, D. C., and said application, fee, and bond should be presented to such officials for filing.

That said W. B. Pyron, through his attorneys, did present and tender to the Commissioner of the General Land [fol. 22] Office of the United States at Washington, D. C., one of respondents, an application to prospect for oil and gas upon the land described in paragraph 7 of the petition for writ of mandamus filed herein and incorporated in the transcript of record in this case on appeal, which application was accompanied by the necessary fee and bond, but that the said commissioner refused to accept for filing or to file said application, fee, and bond, and returned same to

petitioner's attorneys as per Exhibit "A" to the amended answer and response to the rule.

It is further stipulated that the foregoing contains the substance of all the evidence given on the hearing of this cause.

It is further stipulated and agreed that at the hearing in this cause aforesaid, E. C. Finney and O. H. Graves, attorneys for the respondents, agreed in open court that the allegations of paragraph 6 of the petition for a writ of mandamus filed herein and incorporated in the transcript of record in this case on appeal were to be deemed as admitted by respondents.

(Signed) E. C. Finney, O. H. Graves, Attorneys for Appellants and Respondents. James G. Leovy, A. W. Gregg, Weston Vernon, Jr., John W. Fisher, Attorneys for Appellee and Petitioner.

Leave to file granted this May 29, 1930.

F. L. Siddons, Justice Supreme Court of the District of Columbia.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 3, 1930

The respondent presents his assignment of errors as follows:

1. The court erred in finding for the petitioner and against the respondent and in granting the writ of mandamus herein.

2. The court erred in holding that the acts of the President of the United States and of the Secretary of the Interior in the premises, together or separately, do not constitute a temporary executive withdrawal of the public lands subject to prospecting for oil and gas under the provisions of the act of February 25, 1920, commonly called the oil-leasing act, from the purposes of said act.

3. The court erred in holding that the oil-leasing act does not repose in the Secretary of the Interior a discretion

broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant.

[fols. 23 & 24] 4. The court erred in holding that the oil-leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant in the absence of specific rules and regulations.

5. The court erred in holding that the provisions of the last subdivision of Rule 2 of the rules and regulations do not vest in the Secretary of the Interior discretion to refuse to grant any permit in the due exercise of his official duty.

(Signed) O. H. Graves, Attorney for Respondent

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed June 3, 1930

* * * * * * * * *

The clerk in making up the transcript of record on appeal in the above-entitled cause, will include:

1. Petition and exhibits.
2. Amended answer and exhibits.
3. Stipulation filed May 29, 1930.
4. Opinion and judgment of the court.
5. Notation and allowing of appeal.
6. Assignment of errors.
7. This designation.

(Signed) O. H. Graves, Attorney for Respondents.

Service acknowledge- this 29th day of May, 1930.
Weston Vernon, Jr., Attorney for Petitioner.

Clerk's certificate to foregoing transcript omitted in printing.

Tuesday, October 14th, A. D. 1930.

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL MCLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYRON

and No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES MOORE, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

On motion, William O. Wilson, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of the State of Wyoming.

On motion, P. Q. Nyce, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of Utah, New Mexico and Montana.

The argument in the above entitled causes was commenced by Mr. O. H. Graves, attorney for the appellants, and was continued by Mr. E. C. Finney, attorney for the appellants.

Wednesday, October 15th, A. D. 1930.

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. MOORE, Commissioner of the General Land Office, Appellants,

v.

W. B. PYRON

and No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

The argument in the above entitled causes was continued by Mr. James Conlon, attorney for the appellant in No.

5241, and by Mr. Lewis E. Hoffman, attorney for the appellant in No. 5247, and by Mr. James G. Leovy, attorney for the appellant in No. 5250, and by William O. Wilson, Esq., Attorney General of the State of Wyoming, as amicus curiæ, and by Mr. Peter Q. Nyce, as amicus curiæ, on behalf of New Mexico, Utah and Montana, and by Mr. Chester I. Long, as amicus curiæ, on behalf of the State of Colorado, and was concluded by Mr. E. C. Finney, attorney for the appellants.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL MCLENNAN

and No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. MOORE, Commissioner of the General Land Office, Appellants,

v.

W. B. PYRON

and No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

These cases were argued and presented with No. 5241, Wilbur v. Barton, just decided, and the decision in that case is controlling here.

The judgment in each case will be reversed, and the cause remanded.

Reversed.

Chas. H. Robb, Associate Justice.

For reasons stated in his dissenting opinion in No. 5241, Wilbur v. Barton, Mr. Justice Van Orsdel dissents.

Endorsed: Nos. 5247, 5250, 5251. Ray Lyman Wilbur, Secretary of the Interior, Appellant v. United States of America ex relatione Ethel M. McLennan; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellant v. W. B. Pyron; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellants v. United States of America ex rel. H. H. Simpson. Opinion of the Court per Mr. Justice Robb. Court of Appeals, District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia

No. 5241

Ray Lyman Wilbur, Secretary of the Interior, Appellant,

v.

United States of America ex Relatione Roy G. Barton

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

Mr. Justice Robb delivered the opinion of the Court:

Appeal from a judgment in the Supreme Court of the District directing the issuance of a writ of mandamus to compel the Secretary of the Interior "to reinstate the application of the petitioner, Roy G. Barton, * * * and to proceed thereon according to law."

Should the judgment be affirmed, it probably would result in the reinstatement of "more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices."

The cause was heard on petition and answer. There is no dispute as to the facts, which are substantially as follows: On June 6, 1928, Barton filed an application in the Land Office at Las Cruces, New Mexico, for a permit to prospect for oil and gas in a certain described tract of public land of the United States (Act of February 25, 1920; 41 Stat. 437).

On March 13, 1929, the Department of the Interior released a "Memorandum for the Press", reading in part as follows: "Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending. These instructions are in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration.'"

On the same day a telegram was forwarded by the Department to the various United States land offices, including the land office at Las Cruces, New Mexico, reading in part as follows:

"No oil and gas prospecting permits will be issued on and after March 12, 1929. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked."

On March 16, 1929, Departmental Order No. 337 was issued, reading in part as follows:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department. There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications. Probably in none of the cases on hand has the applicant expended money for development purposes, although he may have gone to some expense in opposing

conflicting claims or furnishing additional evidence in support of his application. * * * To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations. Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be cancelled. * * * No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929."

This Order also was incorporated in a "Memorandum for the Press" issued by the Department on the same day.

On March 26, 1929, the Commissioner of the General Land Office, "pursuant to instructions approved by the Secretary of the Interior March 13, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929, rejected" Barton's application. An appeal was taken, and the order of rejection was sustained by the Department in a decision dated September 4, 1929.

In his petition Barton avers "that there is nothing in or under the provisions of the act of February 25, 1920 (41 Stat. 437), * * * which requires your relator to make any substantial expenditures for reliable geological surveys upon the lands embraced in his oil and gas application * * * in order to entitle him to a permit for the lands described in said application"; and that "the Secretary of the Interior is without authority of law to reject his application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed

after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted, and March 16, 1929, also identified as Departmental Order No. 337."

The answer admits, for the purposes of this suit, that Barton "was duly qualified under the law to receive the permit for which he applied; that at all times relator (Barton) was and is now ready, able, and willing to comply with all regulations made pursuant to the said act of Congress respecting the duties and obligations of permittee."

Did the orders of the Secretary of the Interior amount to a temporary withdrawal of the public land from location, entry, and exploration for the purpose of discovering oil or gas; and, assuming the withdrawal, did the mere filing of an application for a prospecting permit initiate a right in the applicant that could not be affected by the withdrawal?

The Act of June 25, 1910 (36 Stat 847), "to authorize the President of the United States to make withdrawals of public lands in certain cases", reads in part as follows:

"Be it enacted * * *, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Prior to 1910 the President had acted in scores of cases without express statutory authority, and in United States v. Midwest Oil Co., 236 U. S. 459, his authority to make such withdrawals was expressly sustained.

There can be no doubt that the effect of the orders issued by the Secretary was to withdraw from further location, entry, and exploration for the discovery of oil and gas all public land, and that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest. That such was the intent of the Secretary and the understanding

of the public is equally plain. It is immaterial that the orders were not limited as to time, for the Act of 1910 provides that such withdrawals or reservations shall remain in force until revoked by the President or by an Act of Congress.

The next question to be determined is whether the withdrawal of the Secretary was the withdrawal of the President. It is settled law that "the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties" (Wilcox v. Jackson, 13 Pet. 498), and that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President" (Wolsey v. Chapman, 101 U. S. 755, 769). In the case last mentioned it was held that the order of the Secretary of the Interior, directing that the lands on the Des Moines River above the Raccoon Fork be reserved from sale, was in contemplation of law the order of the President and had the same effect as the proclamation mentioned in the Act of September 4, 1841 (5 Stat. 453). The Court said:

"A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we can not doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act."

See also United States v. Morrison, 240 U. S. 192; Northern Pacific Railway Co. v. Wismer, 246 U. S. 283; Relation of the President to the Executive Departments, 7 Op. Atty. Gen. 453.

In the present case the orders of the Secretary gave effect to the previously announced policy of the President, were acquiesced in by him, and were in legal contemplation his acts. Was the President vested with such authority?

It is not contended that the Act of June 25, 1910 (36 Stat. 847), expressly authorizing the President to make temporary withdrawal "from settlement, location, sale, or entry any of the public lands of the United States," has been repealed. The contention is that the Act of February 25, 1920 (41 Stat. 437), "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," and providing that public lands containing deposits of such minerals "shall be subject to disposition in the form and manner provided by this Act," was mandatory, and that the President was without power to withdraw such lands from disposition as provided in the Act. Sec. 13 of that Act, relating to oil and gas, provides in part "that the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * *. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed * * *."

Sec. 14 provides in part that "upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit * * *."

There is no provision in the Act purporting to repeal or modify the Act of 1910, and in our view such a modification may not be implied. The provision in the first section that the lands containing certain named mineral deposits "shall be subject to disposition in the form and manner provided by this Act" is general, and no more mandatory than 1872 (17 Stat. 91, R. S. 2319, 2329) was the provision in the Act of ~~1897 (29 Stat. 526)~~

declaring all public lands containing petroleum or other mineral oils to be "free and open to occupation, exploration and purchase by citizens of the United States * * * under regulations prescribed by law"; and yet the President withdrew without direct congressional authority such public lands, and his action was sustained in the Midwest case (236 U. S. 459). But it is insisted that the Act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry," and that the application for permit and the lease which may follow discovery of oil under the Act of 1920 are not embraced within those terms. It is apparent, we think, that the Act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.

In Mason v. United States, 260 U. S. 545, by Executive order dated December 15, 1908, lands had been "withdrawn from settlement and entry, or other form of appropriation." It was contended that this order did not include appropriations by mining locations. The Court observed: "The words 'settlement and entry,' it is said, apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; that mining lands are acquired, not by settlement or entry, but by location and development; that *that* this process is not covered by the words 'other form of appropriation', limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. * * * *If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized?* (Italics ours.) None has been suggested and we can think of none. * * * Moreover, the circumstances leading up to and accompanying the issuance of the order demonstrate conclusively that its main, if not its only, purpose was to preserve from private appropriation the oil and gas which the lands were thought to contain pending investigation and congressional action, and this purpose would have been subverted by appropriations of the nature here involved quite as much as by other forms.

We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order and consequently were prohibited by it."

Under the Act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. This, we think, was akin to location or entry, as used in the Act of 1910.

If, as suggested by counsel for appellee, the Act of 1910 has no application, then it well might be held that an implied power to withdraw was reposed in the President under the Act of 1920. United States v. Midwest Oil Co., 236 U. S. 459.

Under the general mining laws a citizen was free to go upon the public domain. He did the work necessary to discover minerals, staked his claim, recorded notice in the mining district or county records, and his rights became fixed. Forbes v. Gracey, 94 U. S. 762; Belk v. Meagher, 104 U. S. 279. This was true as to public lands containing oil and gas until the Act of February 25, 1920 (41 Stat. 437). Under the provisions of that Act, as already appears, a citizen no longer has a right to go upon public lands of the United States to prospect for oil or gas, unless permitted to do so by the Secretary of the Interior, under such "proper rules and regulations as he may prescribe" (Sec. 13). It is at once apparent that there is a marked distinction between the old law and the new. Under the old law a citizen was free to make explorations as a matter of right. Under the new law he must apply for the privilege. Until that privilege is granted, through the issuance of a permit, he has no vested interest. It is apparent, we think, that Congress recognized the distinction between the old law and the new and that the President might at any time, if conditions changed, withdraw the public lands from exploration. Under Sec. 13 the Secretary is "authorized" to grant prospecting permits. Under Sec. 14, if a permit has been granted and the permittee has incurred the expense incident to the exploration and discovery of "valuable deposits of oil or gas", he "shall be entitled to a lease." Thus Congress recognized that the

mere filing of an application for a permit confers no vested right upon the applicant, but that if a permit be issued and he goes on the land and makes a discovery he has such an interest as must be recognized.

Congress, of course, knew that, if changed conditions rendered advisable the temporary withdrawal by the Executive of the public lands from further exploration, thousands of such applications for permits might be pending. It was careful, therefore, to distinguish between an application for a permit and the rights that might be acquired under an issued permit. Every applicant for a permit was charged with knowledge that the Executive might temporarily withdraw the lands from further exploration, and that his application was, therefore, subject to much authority of the Executive. We rule that the order of the Secretary rejecting Barton's application for a permit was a valid exercise of power by the Executive.

Mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, to remedy and not to promote a wrong, to compel the performance of an actual duty rather than to direct the performance of an act which will work public or private mischief. While classed as a legal remedy, its issuance is largely governed and controlled by equitable principles. Duncan Townsite Co. v. Lane, 245 U. S. 308; Arant v. Lane, 249 U. S. 367; Ex Parte Skinner & Eddy Corp., 265 U. S. 86; Work v. Rives, 267 U. S. 175; Payne v. United States, 50 App. D. C. 119, 269 F. 198; Morgan v. Howard, 54 App. D. C. 3, 293 F. 650; Stowell v. Deming, 57 App. D. C. 223, 19 F. (2d) 697. In the exercise of a sound judicial discretion, the court must be controlled by settled legal principles.

As observed in the Midwest case (236 U. S. 471), "The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large." In the present case, his orders, issued through the Secretary, were intended to meet an emergency occasioned by the great over-production of oil and gas, the waste incident thereto, and other public considerations. There was available to him the advice of

the Attorney General on all questions of law that might be involved. It was necessary to interpret the applicable statutes, and we have expressed the view that they were correctly interpreted; but, in any event, it would require a very clear case to justify a court in arresting and suspending the action of the Executive taken in the public interest. The record does not present such a case.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Department of the Interior, Appellant, v. United States of America ex relatione Roy G. Barton. Opinion of the Court per Mr. Justice Robb. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

No. 5241

Mr. Justice VAN ORSDEL, dissenting:

I am compelled to dissent from the opinion and judgment of my associates.

It is conceded that the applicant Barton possessed all the qualifications necessary under the Leasing Act to entitle him to a permit. In other words, but for the order of the Secretary suspending the operation of the Leasing Act, he would have been compelled to grant Barton's application. We start, therefore, with an applicant entitled to a permit at the time the order was made suspending the provisions of the Leasing Act.

The Act of 1910, vesting authority in the President to withdraw public lands from "settlement, location, sale, or entry", specifically provides the terms upon which this Executive authority may be exercised. It must be done by a formal proclamation, which the Secretary of the Interior is required, by the terms of the Act, to report to Congress at the next regular session after the date of withdrawal. Prior to the enactment of this statute, lands had been withdrawn by proclamation of the President without any par-

ticular authority of statute. Congress, therefore, in the 1910 Act, manifested a clear intention to keep control of the withdrawals of public lands to the extent of specifying the manner and terms under which they could be withdrawn by the President, and in addition requiring notice to be given it of such withdrawals by the Secretary of the Interior in order that the action of the President, if deemed advisable, might be promptly revoked.

This brings us to what was done in this case. No proclamation, formal or otherwise, was ever issued by the President, and no notice of any proclamation was given Congress by the Secretary, as required by the 1910 Act. The order of the Secretary, telegraphed the local land officers, was based upon the following newspaper report under date of March 12, 1929, purporting to express the views of the President: "There will be no leases or disposal of government oil lands, no matter what category they may lie in, of government holdings or government controls, except those which may be mandatory by Congress. In other words, there will be complete conservation of government oil in this administration."

It will be observed that this merely purports to state a future policy which the President might or might not adopt in respect to government oil lands. It was not transmitted by the President to the Secretary of the Interior. The information upon which he based his order was obtained exclusively through the press. The press report merely referred to a declaration said to have been made by the President, which he could only make effective by a formal proclamation. There was, therefore, no proclamation whatever under the terms of the 1910 Act which would justify in the remotest degree the action taken by the Secretary of the Interior.

Neither can the action of the Secretary be upheld under the doctrine of acquiescence. It is undoubtedly true that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President". The President is the head of the Executive Department of the government, and the lawful acts of his subordinates will be presumed to be his acts, but this presumption does not extend to unlawful acts of subordinates. The difficulty

here is that the Secretary acted without the scope of his power in the suspension of the oil leasing act. He was totally without power to act until certain statutory conditions had been complied with; namely, the issue of a proclamation by the President.

The cases relied upon in the majority opinion are not in point. In Wilcox vs. Jackson, 13 Pet. 498, a preemption entry had been made upon land set aside and occupied for more than twenty years as a military reservation, on which the government had expended large sums of money under the direction of the Secretary of War. Of course, a long continued use of public land by the government itself for military purposes, or for other purposes, would constitute an occupancy by the government on its own land, amounting to a withdrawal of the land from entry and settlement; and, whether done by direct authority of the President or by the lawful act of the Secretary of War, the President, after this long lapse of time, would be assumed to have acquiesced in the withdrawal and occupation of the land.

The case of Wolsey vs. Chapman, 101 U. S. 755, has even less application to the present case than does the Wilcox case. Here, a large tract of land had been granted to the Territory of Iowa for the development of navigation on the Des Moines river. The execution of the Act was delegated to the Secretary of the Interior, and was accordingly within the lawful scope of the authority vested in him. A controversy arose as to the limits of the land granted—whether it extended beyond a point in the river known as Racoon Fork. The matter required determination from many angles by the Department of the Interior, and, to protect the interests of all concerned, the Secretary suspended settlement on the lands in question until the matter could be legally determined. It was said, and properly so, that the act of the Department, being within the scope of its powers, would be regarded in law as the act of the President. The difference between that case and the one at bar is that here there is only one law under which a withdrawal such as we are here considering can be made; namely, through the Proclamation Act of 1910. This act is a specific grant of power by Congress to the President by which he may in his discretion withdraw public lands from entry,

sale, or settlement. Being a grant of power belonging to Congress, it should strictly be complied with, and the courts will not imply compliance from circumstances such as those involved in this case.

The case of United States vs. Midwest Oil Company, 236 U. S. 459, has little or no analogy to this case. There, the proclamation of the President, issued before the enactment of the 1910 statute, hence without specific statutory authority, described accurately the territory withdrawn, the character of the land, and the object of withdrawal. The President, doubtful of his authority in the premises, submitted the whole matter to Congress for its approval. It resulted in the prompt enactment of the 1910 statute. The proclamation was prepared with all the formalities and dignity of a document promulgated by the President with a view to affecting great public and private interests. In that case the oil company entered upon the lands after the proclamation was issued. The court, in its opinion, strongly implied that if the entry upon the lands had been made prior to the issuance of the proclamation by the President, it would have had a different case. Here the application was filed prior to the order of the Secretary, and here there was no proclamation whatever as required by statute.

It is not true that the applicant was required to do nothing on the land before filing his application for a permit. He was required by the Leasing Act to seek out the location, to post notices, giving a description of the land for which application would be made—if surveyed land, by the lines of survey; if unsurveyed, by descriptive metes and bounds. This constituted an entry upon the land, which developed into a right with the filing of the application of which the applicant cannot be divested by any act of the Executive Department. This is settled law by numerous decisions of the Supreme Court as to entry upon public lands, such as homestead, preemption, etc. Entry upon oil lands is in every respect entitled to the same legal significance as entry upon lands for the purpose of acquiring title. In Mason v. United States, 260 U. S. 545, it was contended that the words "settlement and entry" applied only to the act of settling upon the soil and making entry in the land office, and that it did not apply to mining lands which it was

contended were not acquired by settlement and entry but by location and development, but the court said:

"If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested and we can think of none."

This is not an action to mandamus the President. The writ runs against the Secretary of the Interior and the Commissioner of the General Land Office. The President, so far as I am able to observe, has had nothing to do with this case. The case grew out of orders originated in the Land Department, based upon newspaper rumor; and the action here is to compel the Secretary of the Interior and the Commissioner of the General Land Office to perform purely administrative duties imposed upon them by law. That mandamus will lie for this purpose is too elementary to require citation of authority. While the judgment is to require a department officer to perform a purely administrative duty imposed by Congress, the court has no power under the sanction of "judicial discretion" to withhold its mandate, even though, in its judgment, to compel the enforcement might not be in the public interest. The policy of the law belongs to the legislative and not the judicial department of the government.

The court is called upon here to determine purely questions of law, and it is immaterial whether one, or five-thousand, or ten-thousand applicants would be affected by the court's decision. Neither, in the agitated state of the public mind, should the fact that this is an "Oil Case" entitle it to any particular sanctity in the eyes of the law, or furnish adequate ground for the wholesale slaughter of private property rights by judicial decree. The present inquiry is limited to determining the important questions of law here involved. It would seem, therefore, unnecessary to consider the facts stressed in the majority opinion "that the purpose of such withdrawals was to meet conditions due to great over-production and to conserve oil and gas in the public interest"; or that, if the judgment be affirmed in this case, "it would probably result in the reinstatement of 'more than five-thousand applications for oil

and gas permits on the public lands pending in the Land Office in Washington, and an unknown number in the field offices' ".

These might furnish commendable reasons for a proper and lawful withdrawal of the lands either by formal proclamation of the President or by Act of Congress, but we have hardly reached the period where the laws of the land can be suspended or repealed by the arbitrary methods here employed.

For the reasons stated, the judgment should be affirmed.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Interior, Appellant, v. United States of America ex rel. Roy G. Barton. Dissenting Opinion per Mr. Justice Van Orsdel. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Monday, December 1st, A. D. 1930.

* * * * * * *

No. 5250, October Term 1930

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. MOORE, Commissioner of the General Land Office, Appellants,

v.

W. B. PYRON

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Robb, December 1, 1930.

Mr. Justice Van Orsdel dissenting.

In the Court of Appeals of the District of Columbia

No. 5250

Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

United States ex Rel. W. B. Pyron, Appellee

Designation of Record

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court, and dissent.
4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

John W. Fisher, A. W. Gregg, Attorney for Appellee.

Service accepted this 6th day of January, 1931.
O. H. Graves, Attorney for Appellants.

[Endorsed:] No. 5250. In the Court of Appeals, District of Columbia. Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants, v. United States ex rel. W. B. Pyron, Appellee. Designation of Record. A. W. Gregg, Attorney for Appellee, 822 Investment Bldg., Washington, D. C. Court of Appeals, District of Columbia. Filed Jan. 6, 1931. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the fore-

going printed and typewritten pages numbered from 1 to 46, inclusive, constitute a true copy of the transcript of record and proceedings of the said Court of Appeals in the case of Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants, vs. W. B. Pyron, No. 5250, January Term, 1931, as the same remain upon the files and record of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 7th day of January, A. D. 1931.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

(392)

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,665. District of Columbia Court of Appeals. Term No. 743. United States of America ex rel. W. B. Pyron, petitioner, vs. Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office. Petition for a writ of certiorari and exhibit thereto. Filed February 18, 1931. File No. 35,665.

FILE COPY

Office Supreme Court, U. S.
FILED
FEB 18 1931
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 743

UNITED STATES OF AMERICA EX REL. W. B. PYRON, PETITIONER AND APPELLEE BELOW,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND C. C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE, RESPONDENTS AND APPELLANTS BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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(35,665)

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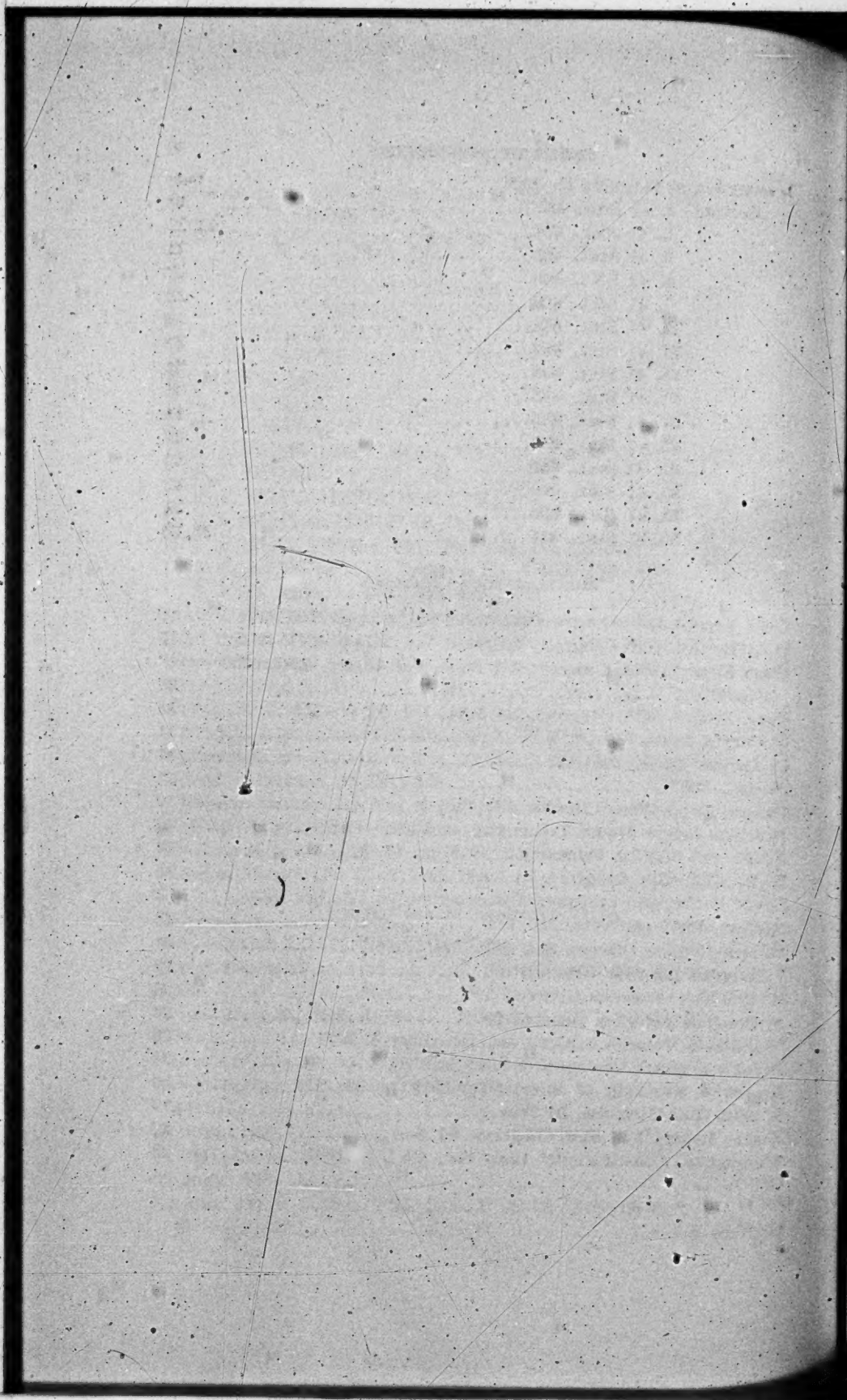

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 743

UNITED STATES OF AMERICA EX REL. W. B. PYRON, PETITIONER AND APPELLEE BELOW,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND C. C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE, RESPONDENTS AND APPELLANTS BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of W. B. Pyron respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

History of the Proceeding.

This is an action at law brought in the Supreme Court of the District of Columbia by W. B. Pyron,

petitioner herein, against Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, respondents herein, for a writ of mandamus commanding the said respondents to accept for filing and to file the petitioner's application for a permit to prospect for oil and gas on certain lands under the Act of Congress approved February 25, 1920 (41 Stat. 437; U. S. C., Title 30, sec. 181) and to proceed therewith according to law (R. 1). The respondents filed an answer and later an amended answer (R. 13). Thereafter testimony was heard by the court without a jury (R. 19). On April 19, 1930, the Supreme Court of the District of Columbia entered its judgment in favor of the petitioner and directed that a writ of mandamus issue requiring the respondents to accept for filing and to file the application of the petitioner specified in the cause and to proceed therewith according to law (R. 20). From this judgment, the respondents appealed to the Court of Appeals of the District of Columbia (R. 21).

At or about the same time, the Supreme Court of the District of Columbia rendered similar judgments in three other cases involving a similar question, which cases were likewise appealed to the Court of Appeals of the District of Columbia, and in that court were argued and presented at the same time as the instant case. The names of the said cases with their numbers in the Court of Appeals are: *Ray Lyman Wilbur, Secretary of the Department of the Interior, v. United States of America, ex rel. Roy A. Barton,* No. 5241; *Ray Lyman Wilbur, Secretary of the Interior Department, v. United States of America, ex rel. Ethel Mc-*

Lennan, No. 5247; and *Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, v. United States of America, ex rel. H. H. Simpson*, No. 5251 (R. 27).

On December 1, 1930, the Court of Appeals of the District of Columbia reversed the judgment of the Supreme Court of the District of Columbia in the instant case and remanded the cause, at the same time likewise reversing the judgments in and remanding the three other causes above named (R. 27, 37). One of the justices dissented from the said judgments (R. 27).

The opinion of the Supreme Court of the District of Columbia in the instant case appears at page 19 of the Record. The Court of Appeals did not accompany its decision in the instant case with an opinion but referred, as controlling in the instant case, to the decision of the court in case No. 5241, *Wilbur v. Barton* (R. 27). The opinion of the Court of Appeals in the case of *Wilbur v. Barton* appears at page 28 of the Record. The dissenting opinion of Mr. Justice Van Orsdel of the Court of Appeals in that case appears at page 37 of the Record. The opinions of the courts are not yet reported.

Facts.

On December 9, 1929, W. B. Pyron, the petitioner, through his attorney, advised the Register of the United States District Land Office at Sacramento, California, that he proposed to file with the Register, in accordance with the Act of February 25, 1920, an ap-

plication for a permit to prospect for oil and gas on certain public lands in Fresno County, California. Petitioner's attorney was advised by the Register that no applications for such permits were being received or could be received by him, since the Secretary of the Interior had ordered Registers not to receive applications after March 12, 1929, and that if an application were presented for filing it would be returned without any record having been made of its receipt and without any consideration having been given the same. The Register further advised petitioner's attorney that if he contemplated the institution of proceedings to compel the acceptance and consideration of the application it should be forwarded to Washington for filing with the Commissioner of the General Land Office (R. 5).

Petitioner's attorney subsequently mailed to the Register such an application, accompanied by the necessary bond and filing fee, but same were returned without being filed. Petitioner's petition for mandamus alleged such presentation to the Register (R. 5), and although such allegation was denied for lack of knowledge by respondents' amended answer (R. 13), it was admitted in open court by counsel for respondents, and such admission was stipulated to by counsel for respondents (R. 21, 22).

On December 14, 1929, the petitioner through his Washington counsel presented to the General Land Office of the Interior Department his application, in proper form and accompanied by the necessary bond and filing fee (R. 10-12). The Land Office refused to accept or to consider the application. It was returned

to petitioner's attorneys with a letter of transmittal which stated that because of the order of the Secretary of the Interior directing Registers not to accept any applications after March 12, 1929, the application could not be received (R. 16).

The Question Involved.

May the Secretary of the Interior lawfully refuse to accept or to consider the application of W. B. Pyron for a permit to prospect for oil and gas on public lands, presented in accordance with the Act of February 25, 1920 (41 Stat. 437)?

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The question arising here of the right of a qualified applicant for a permit to prospect for oil and gas who presents his application in accordance with the Act entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," approved February 25, 1920, to have his application accepted and considered, is of general importance.

(2) The case involves a question of substance relating to the construction and application of the Act of February 25, 1920, which has not been, but should be, settled by this Court.

(3) The case involves a question of substance relating to the construction and application of the Act en-

titled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, which has not been, but should be, settled by this Court.

(4) The Court of Appeals did not give proper effect to the decision of this Court in the case of *U. S. v. Midwest Oil Company*, 236 U. S. 459, as to the implied power of the Executive to make withdrawals of public lands for public purposes.

The general importance of the question here involved is evident from the statement of the majority opinion of the Court of Appeals of the District of Columbia that, if the judgment of the trial court should be affirmed, "it probably would result in the reinstatement of 'more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices' ". It follows that if the judgment of the Court of Appeals becomes final, it will result in the denial to all such applicants of the right to have their applications filed and considered, not because of any lack of qualification on the part of the applicants or because of any defects in their applications, but solely because of a policy with respect to the development of the public lands of the United States adopted by the Executive Department without legislative sanction. The question is also important because the action of the respondents which was approved by the decision of the Court of Appeals not only denies to a large number of individual applicants the benefits of the Act, but also

denies to the Government the assistance of private enterprise and initiative in developing the mineral resources in the public lands, and deprives the Government of the protection to its own interest in such mineral resources resulting from the discovery, through private initiative and enterprise, of the mineral character of certain public lands, whereby the Government is put on notice that title to such lands should not be permitted to pass from the Government to private ownership under the homestead or other laws pertaining to lands not known to have mineral value.

The effect of the action of the respondents in refusing to accept or consider any applications for prospecting permits under the Act of February 25, 1920, was to suspend the operation of the act as to oil and gas. The effect of the decision of the Court of Appeals is to approve such suspension. The case, therefore, involves a fundamental question as to the construction and application of the Act, namely, whether it lays upon the Executive Department a mandatory duty, or confers upon it a discretionary power; whether it declares the policy of the United States with respect to the development of public lands and provides a method for such development, or whether it leaves the determination of such policy to the Executive Department; whether, in short, this Act of Congress, in so far as respects oil and gas, may be completely suspended and its operation wholly nullified by an act of the Executive Department.

Moreover, the Court of Appeals adopted a construction of the Act of February 25, 1920, which, in petitioner's view, renders that Act unconstitutional. Such

construction involves a delegation by Congress to an administrative official of the power to determine the policy of the law, whether that policy should be to develop and promote mining, or whether it should be one of absolute inactivity. Such delegation of power without limitation and without laying down any rules to guide the administrative official in determining such policy, it is submitted, would be unconstitutional. For this reason also, the decision of the Court of Appeals involves a question of substance relating to the construction and application of the Act.

The Court of Appeals decided that under the Act of June 25, 1910, 36 Stat. 847, which expressly authorized the President to make temporary withdrawals "from settlement, location, sale or entry of the public lands of the United States" and prescribed certain details with respect to such withdrawals, the Executive Department had a right to withdraw public lands from the operation of the Act of February 25, 1920, as respects oil and gas, in effect without limitation either as to the time during which such withdrawal should continue, or as to the quantity of land included in the withdrawal, or as to the purposes of the withdrawal, and without specifically describing any of the lands or carrying out any of the administrative details prescribed. The petitioner's position is that withdrawals from the operation of the Leasing Act of February 25, 1920, are not authorized by the Act of June 25, 1910; but that if that Act is properly construed as authorizing such withdrawals, they must be temporary, the lands must be specifically described, the area

of land withdrawn must have some limitation, the purposes of the withdrawal must be specified and must be similar in character to the purposes specified in the Act, and certain administrative details must be carried out. The questions, whether the Act of June 25, 1910, has any application to the present situation, and whether, if it has, it supports such executive action as is here involved, are fundamental questions as to the construction and application of the Act.

The Court of Appeals also held that, even if the Act of June 25, 1910, has no application in the instant case, the action of the respondents might be supported under the authority of *United States v. Midwest Oil Company*, 236 U. S. 459. It is the view of the petitioner that this decision of this Court, while it recognized an implied power in the Executive Department to withdraw lands, recognized that such power existed only through the acquiescence of Congress, and only to the extent exercised in executive withdrawals which had occurred prior to the time of the decision and for purposes of the same character. It is the view of the petitioner that the present withdrawal, if the action of the Executive in the instant case may be treated as a withdrawal, is entirely different from withdrawals of the kind authorized under the Midwest decision. It is also the view of the petitioner that in the Midwest decision, this Court, while recognizing the implied power of the President in the absence of legislation, did not recognize such implied power as existing after the passage of the Withdrawal Act of June 25, 1910, but did recognize that act as a restric-

tion of such power. The case, therefore, involves a question as to the application of the decision of this Court in the Midwest case.

Your petitioner, therefore, prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Court of Appeals of the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in this case, and that the judgment of said Court of Appeals of the District of Columbia may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may deem proper.

Respectfully submitted,

W. B. PYRON,
Petitioner,

By JAMES G. LEOVY,
JOHN W. FISHER,
Counsel for Petitioner.

A. W. GREGG,
WESTON VERNON, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 743

UNITED STATES OF AMERICA EX REL. W. B. PYRON, PETITIONER AND APPELLEE BELOW,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND C. C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE, RESPONDENTS AND APPELLANTS BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of the District of Columbia was filed April 15, 1930. It is not officially reported. It appears at page 19 of the printed Record.

The Court of Appeals of the District of Columbia did not accompany its decision in the instant case with an opinion (R. 27). The opinion in which the court

gave its reasons for its judgment in the instant case was handed down in the case of *Ray Lyman Wilbur, Secretary of the Interior, v. United States of America ex rel. Roy G. Barton* (Court of Appeals No. 5241). This opinion appears at page 28 of the printed Record. It has not yet been officially reported. The dissenting opinion of Mr. Justice Van Orsdel appears at page 38 of the printed Record.

II.

Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. 27).

The statutory provision which is believed to sustain the jurisdiction is Section 240, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; U. S. C., Title 28, sec. 347).

III.

Statement of the Case.

A statement of the case has been given in the preceding petition under heading "A" (pp. 1, 2) and will not be repeated here.

IV.

Specification of Errors.

1. The Court of Appeals of the District of Columbia erred in holding that under the Act of February 25,

1920, the respondents had authority to refuse to accept or consider any applications for prospecting permits after March 12, 1929, and to refuse to accept or consider petitioner's application pursuant to such general policy.

2. The Court of Appeals of the District of Columbia erred in holding that the action of the respondents constituted a valid withdrawal of all public lands from prospecting for oil and gas.

3. The Court of Appeals of the District of Columbia erred in holding that the Executive Department had power to make such a withdrawal from the operation of the Leasing Act of February 25, 1920, as is here involved.

4. The Court of Appeals of the District of Columbia erred in holding that this was not a proper case for the issuance of a writ of mandamus.

V.

ARGUMENT.

Summary of the Argument.

A.

The refusal of the respondents to accept or consider any applications for prospecting permits after March 12, 1929, and their refusal to accept or consider petitioner's application is contrary to the Leasing Act of February 25, 1920.

1. *The purpose of the Leasing Act was to encourage the exploration of the public domain and the discovery*

of its mineral resources, and to promote the mining of oil and gas on public lands through the issuance of prospecting permits and leases.

2. *The Leasing Act makes it mandatory for the Secretary of the Interior to accept applications for prospecting permits, and to issue such permits to qualified applicants.*

3. *If the Leasing Act is construed to confer authority on the Secretary of the Interior at his discretion to refuse to accept applications for prospecting permits and to refuse to issue such permits, it is unconstitutional in that it confers legislative power on an executive officer.*

B.

There has been no valid, effective withdrawal of all public lands from prospecting for oil and gas.

1. *The extreme limit of the present power of the Executive to make general withdrawals of public lands is defined by the Act of June 25, 1910.*

2. *The action of the executive officers in the present case was neither intended as a withdrawal under the Act of June 25, 1910, nor did it comply therewith.*

3. *Even if, in addition to his express power under the Act of June 25, 1910, the President has implied power to withdraw public lands under the doctrine of U. S. v. Midwest Oil Co., 236 U. S. 459, the alleged withdrawal here involved cannot be supported on the authority of that decision.*

C.

The Executive has no power to make a general withdrawal of all public lands from the operation of the Leasing Act.

D.

Writ of mandamus should issue.

Preliminary Considerations.

Under the Constitution, Congress is the principal agent of the public in control of the public domain and as such has the power of disposition and of making all needful rules and regulations with respect thereto, and the absolute right to prescribe the times, the conditions, and the mode of transferring the public lands, and to designate by whom and to whom the transfer shall be made. *Butte City Water Co. v. Baker*, 196 U. S. 119, 126; *Terrace v. Thompson*, 263 U. S. 197; *Utah Power & Light Co. v. United States*, 243 U. S. 389; *Gibson v. Choteau*, 13 Wall. 92.

The Land Department is only a sub-agent designated by Congress to carry out the will of Congress with respect to the general care and disposition of the public lands and to perform certain specific duties. *Kirwan v. Murphy*, 189 U. S. 35.

A.

The refusal of the respondents to accept or consider any applications for prospecting permits after March 12, 1929, and their refusal to accept or consider petitioner's application is contrary to the Leasing Act of February 25, 1920.

1. *The purpose of the Act of February* 25, 1920 *(hereinafter generally referred to as the Leasing Act) was to encourage the exploration of the public domain and the discovery of its mineral resources, and to promote the mining of oil and gas on public lands through the issuance of prospecting permits and leases.*

Prior to the Leasing Act of February 25, 1920, public oil lands were subject to complete alienation from Government ownership by patent under the placer mining laws, which had been made applicable to oil deposits by the Act of February 11, 1897 (U. S. C., Title 30, Sec. 101; 29 Stat. 526). The alienation of such lands in the manner thus provided proceeded so rapidly that the President, to insure naval oil reserves, in 1909, withdrew extensive areas of public lands from the operation of the law for such reserves under an "implied" power, and thereafter temporarily withdrew additional lands for other "public purposes" under the authority of the Withdrawal Act of June 25, 1910 (U. S. C., Title 43, sec. 141-3; 36 Stat. 847-8). By 1919, more than 53,000,000 acres of lands containing coal, oil, oil shale, phosphate, potash, and other minerals had been withdrawn (Congressional Record, 66th Congress, 1st session, Vol. 58, p. 4784).

Public lands not known to have any mineral value might also pass to private ownership under the homestead laws. For lands passing under the homestead laws, the Government received only a small homestead fee. For lands passing under the placer mining laws, the Government received a nominal payment of a few dollars per acre.

The United States was thus deriving little benefit from the valuable mineral resources contained in the public lands. The extensive withdrawals by the President from the operation of the placer mining laws prevented all exploration, development, and use of the withdrawn lands and the Government benefited to the extent of only a small sum from the disposal of the lands not withdrawn. While the United States Geological Survey, under its limited appropriations, was active to prevent the passing of valuable mineral lands to private ownership except under the placer mining laws, the operations of the Survey were too limited to give adequate protection through the discovery of the mineral value of the lands, and the Government's principal aid came from the activity of individuals who sought mineral claims to such lands, or protested or contested non-mineral entries or claims.

Under these circumstances, the Secretary of the Interior proposed a bill which, after some modification, became the Leasing Act of February 25, 1920 (Hearings before House Committee on Public Lands on H. R. 3232 and S. 2812, February 5, 1918, pp. 31, 32). Under this Act, the public lands of unknown mineral char-

acter were no longer open to unlimited prospecting by "wildcatters" and others, nor were they subject to absolute alienation. Instead, it was necessary to make application for the privilege of prospecting, permits were limited in number and acreage, and the lands were disposed of only by lease on a royalty basis. It was a new policy (*West v. Work*, 56 App. D. C. 191, 11 Fed. (2d) 828, certiorari denied 271 U. S. 689).

Under the Leasing Act, it has thus become of greatly increased importance to the Government to become informed of the mineral character of the public lands. When the mineral value of the lands is unknown, there is danger that they may pass to absolute private ownership under the homestead or other laws not applying to known mineral lands. This new policy was in itself a policy of conservation. Moreover, the United States, being entitled to royalties from leased lands, now has a direct interest in the development of the public mineral resources.

That Congress intended by the Leasing Act to put into effect a policy of development is not only supported by this background of circumstances, which indicates the advantages to the United States of such a policy, but also by the language used in the title of the Act, namely, "An Act to Promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain," the choice of the language not being an accident but the result of careful consideration in Congress (see titles of H. R. 3232 and of S. 2812, 65th Congress, 2d session); by the regulations of the Interior Department and by its decisions in cases which

have arisen under the Leasing Act (General Land Office Circular 672, par. 3, p. 8; *re* E. M. Harrison, 49 Land Decisions 139; *Enlow v. Shaw,* 50 Land Decisions 339); and by the debates in Congress which occurred in connection with the bill (Congressional Record, 66th Congress, 2d session, pp. 2710, 2711, and also 1st session, pp. 4271, 4272).

2. *The Leasing Act makes it mandatory for the Secretary of the Interior to accept applications for prospecting permits and to issue such permits to qualified applicants.*

This is shown by the language of section 1 of the Leasing Act, providing that "* * * deposits of coal, * * * oil, * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act, * * *". The term "subject", according to Webster, means "placed or situated under, * * * obedient, submissive * * *"; and "subject" means to "cause to undergo". The language of section 1, therefore, means that the oil and gas in public lands should be caused to undergo disposition or should be submitted to disposition. By the action of the respondents the public lands, so far as oil and gas are concerned, have ceased to be subject to disposition.

The use of the term "authorized" in section 13 of the Act, which provides "That the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a

prospecting permit, which shall give the exclusive right for a period not exceeding two years, to prospect for oil and gas * * *", does not mean that unlimited discretion is granted to the Secretary of the Interior. Such language is consistent with the imposition of a duty. The rule is that when a public officer is clothed with power and furnished the means of doing acts which concern the public interest or the rights of individuals, the execution of such power may be insisted upon as a duty, although the statute is in terms permissive (*State of Maryland v. Miller*, 194 Fed. 775-779; *Bank v. Supervisors*, 51 N. Y. 401; *Mayor, etc., v. Furze*, 3 Hill 612 (N. Y.); *U. S. v. Cornell Steamboat Co.*, 137 Fed. 455-457-458; *A., T. & S. F. Ry. Co. v. United States*, 52 Ct. Cl. 338-352; *Chase v. United Stetes*, 261 Fed. 833; *United States Sugar Board v. De Ronde & Co.*, 7 Fed. (2d) 981-4-5-6). In no case are the duties imposed discretionary, unless, after the word "authorized" the words "in his discretion" or similar words are added. (*Chase v. United States*, 261 Fed. 833, 837; *United States Sugar v. De Ronde & Co.* 7 Fed. (2d) 981, 986.) It has nowhere been held, as contended by the respondents, that a statute using permissive language must affect vested property rights, or existing rights or values, before it will be construed as imposing an imperative duty on public officials.

In many places the Leasing Act carefully differentiates between the general mandatory duties laid on the Secretary of the Interior and the discretionary powers granted to him. In authorizing acts by the Secretary of the Interior in many of the sections, the

words "in his discretion" or "within his discretion" and "in his judgment" are used, as in sections 2, 4, 17, 18, 21, 22, 25, 29, 30, and 36. Section 32 is particularly significant in its provision that the Secretary is "authorized" to prescribe necessary rules and regulations to carry out the provisions of the Act. It would hardly be contended that the Secretary might have refused to prescribe any regulations.

It is not asserted that every person who applies is entitled of course to a permit. The Secretary must determine whether the applicant meets the statutory requirements of a permittee and whether the land described in the application is open to leasing or is excluded by the statute from its operation. Such judicial or quasi judicial discretion cannot extend to cover the refusal to entertain applications.

The Interior Department itself has not construed the Act as conferring unlimited discretion, as appears in *Martin Wolfe*, 49 Land Decisions 625, where the Department interpreted the Act as allowing the Secretary only quasi judicial discretion in individual cases, but, in any event, the Secretary cannot add to his powers by any rule or regulation made by him, and if the regulations prescribed by him for the administration of the Act actually purport that such discretion rests in the Secretary, it is submitted that they are contrary to law and not binding on the courts.

The uniform construction of State leasing acts which provide that individuals "may" apply for leases and that officials are "authorized" to grant them, has been that it is an imperative duty of the official to issue a lease when a qualified applicant submits a proper ap-

plication. (*State ex rel. Pindall v. Ross*, 55 Wash. 242, 104 P. 216; *State ex rel. Hall v. Savidge*, 93 Wash. 676, 161 P. 471; *State ex rel. Walls v. District Court* (Wyo.), 267 P. 1060; *Whiteman v. Severance*, 46 Minn. 495, 49 N. W. 255; *Frank v. Robinson* (Tex.), 8 S. W. (2d) 653; *Theisen v. Robison* (Tex.), 8 S. W. (2d) 646; *Freels v. Walker* (Tex.), 26 S. W. (2d) 627.)

The power which the Secretary of the Interior may have to protect the public interest and to exercise supervision of the public lands is not as broad as the discretion he has claimed in this case. In certain instances the Leasing Act allows the Secretary to determine his conduct in accordance with what he believes will be to the public interest, but wherever the statute intended such broad discretion to be exercised, it specifically conferred that discretion in unmistakable terms, as in sections 2, 6, 7, and 36. The general supervision of the public lands granted to the Secretary by various statutory provisions must be exercised within statutory limits. Such power of supervision conferred upon the Secretary "does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment "for the will of Congress as manifested in the granting act." *West v. Standard Oil Co.*, 278 U. S. 200; *Payne v. Central P. R. Co.*, 255 U. S. 228.

The respondents have attempted to justify their action on the ground that it is necessary to prevent waste of the oil and gas resources of the country. The Leasing Act, however, nowhere provides or implies that it may be suspended at the will of the Secretary when he conceives that oil is being wasted. On the

other hand, section 16 does provide that the permittee will use all reasonable precaution to prevent waste, and the violation of this provision constitutes ground for forfeiture of the permit or lease. Section 30 of the statute makes it further mandatory for the Secretary to *insert in leases* provision "for the prevention of undue waste * * * and such other provision as he may deem necessary * * * for the safeguarding of the public welfare." Moreover, the Secretary and the permittee may agree to suspend drilling operations in order to prevent waste (36 Opinions Attorney General 29, May 6, 1929). It is submitted that the specific provisions in the Act for the prevention and punishment of waste negative any such general or implied discretion in the Secretary to suspend the operation of the Act, so far as respects oil and gas, in order to prevent waste. Moreover, to permit the inception of rights to explore the public lands for oil does not necessarily entail the extraction of oil. Suspension of the Leasing Act would have little effect on production, since approximately three per cent of the oil produced is taken from public lands (Reports Director Geological Survey). In any event, the petitioner is not seeking a permit to waste oil. Whether, if he is permitted to go on public land which is not now within any known geological structure of a producing oil or gas well, the petitioner will discover oil; whether the alleged condition of overproduction will still exist, if and when such discovery is made; and what may happen in the event that it does then exist, are matters about which it is too early to speculate.

3. *If the Leasing Act is construed to confer authority on the Secretary of the Interior at his discretion to refuse to accept applications for prospecting permits and to refuse to accept such permits, it is unconstitutional in that it confers legislative power on an executive officer.*

Not only should statutes be so construed as to sustain their constitutionality, but a construction which raises doubtful constitutional questions must be avoided where some other construction is open (*Missouri Pacific Ry. Co. v. Boone*, 270 U. S. 466; *Baender v. Barnett*, 255 U. S. 224; *Harriman v. I. C. C.*, 211 U. S. 407; *United States ex rel. Attorney General v. Delaware, etc., Co.*, 213 U. S. 366). While Congress can delegate discretionary authority to an executive officer to determine in a specific case when and how the powers legislatively conferred are to be exercised, and to establish rules and regulations not contrary to the act, fixing the manner in which the requirements of the statute are to be met (*La Coste v. Department of Conservation*, 263 U. S. 545; *United States v. Grimand*, 220 U. S. 506; Willoughby, Constitutional Law, sec. 1077, p. 1637); and while Congress may authorize an executive officer to suspend the provisions of an act under given circumstances so long as the facts which are to determine the suspension are precisely stated by the legislature and certainly ascertained by the executive, and there is nothing involving the expediency or the just operation of such legislation left to the determination of the executive officer (*Field v. Clark*, 143 U. S. 649;

Butterfield v. Stranahan, 192 U. S. 470); Congress cannot delegate to an administrative official the power to cut down the rights given by statute (*United States v. George*, 228 U. S. 14; *Field v. Clark*, 143 U. S. 649, 694; *Johnson v. Keating* (C. C. A. 1), 17 Fed. (2d) 50, 52). If the Leasing Act allows the Secretary of the Interior to suspend it, then, since the conditions, the contingencies, or the exigencies under which this action may be taken are not defined in the statute, the act must be held unconstitutional in so far as it attempts to confer any such authority. It is submitted, therefore, that the statute may not properly be so construed.

B.

There has been no valid, effective withdrawal of all public lands from prospecting for oil and gas.

1. *The extreme limit of the present power of the Executive to make general withdrawals of public lands is defined by the Act of June 25, 1910.*

The respondents have defended their action in refusing to issue permits as a temporary withdrawal of public lands from the operation of the Leasing Act.

It follows from the fact that Congress has full charge of the public domain under the Constitution, that authority for any Executive withdrawal or withholding from disposition of lands which Congress has made subject to disposition, must be derived from statutes expressly conferring such authority, or from Congres-

sional acquiescence (*United States v. Midwest Oil Co.*, 236 U. S. 459; *Burfenning v. Chicago, etc. R. Co.*, 163 U. S. 321; *United States v. Tichenor*, 12 Fed. 415, 422; *Grisar v. McDowell*, 6 Wall. 363; Re Fort Boise Hay Reservation, 6 Land Decisions 16; 17 Opinions Attorney General 160).

Prior to 1909, the President had on a number of occasions, by special order or proclamation and sometimes informally, withdrawn lands which Congress had thrown open to acquisition. Thus, proclamations establishing Indian reservations, military reservations, and bird reserves had been issued. At that time, it was possible for a citizen to obtain an absolute patent to oil and gas land. By 1909, the public oil lands in California and Wyoming were rapidly being patented, and in that year, the President, in order to insure naval oil reserves, withdrew from the operation of the mining laws certain tracts of land in these states.

The validity of this withdrawal was tested in the case of *United States v. Midwest Oil Company*, 236 U. S. 459, in which this Court held that, while Congress has supreme legislative power over the public domain and exercises the power of a proprietor therein, it could waive its strict rights, and that by silent acquiescence in the Presidential withdrawals made without statutory authority, the President, in effect, had been constituted the agent of Congress, the principal, with implied power to make withdrawals for public purposes.

This decision was rendered in 1915. Shortly after the withdrawal of 1909, President Taft, in a special

message to Congress, requested Congress "by statute to validate the withdrawals that have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior, temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise * * *". (See *United States v. Midwest Oil Company*, 236 U. S. 459.) In response to this message Congress passed the Act of June 25, 1910 (36 Stat. 847), which will be referred to hereafter as the Withdrawal Act. However, instead of authorizing the Secretary of the Interior to withdraw lands as the President had requested, Congress provided that the *President* might, at any time, in his discretion, *temporarily* withdraw any of the public lands from settlement, location, sale or entry, and reserve such lands for water power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, such withdrawals or reservations to remain in force until revoked by him or by act of Congress. The Act further provided that the Secretary of the Interior should report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

The petitioner submits that the Withdrawal Act defines the extreme limit of the present power of the Executive to make general withdrawals of public lands, and that any withdrawal made since the date of the Act must have been made in the manner and form and for the purposes therein prescribed. In the Midwest

case, this Court reviewed the legislative history of the Withdrawal Act and noted that the majority of the Senate Committee in charge of the bill had reported that the President already had a general power of withdrawal and recommended the passage of the pending bill "inasmuch as it operated to restrict the greater power already possessed. Sen. Rep. 171 (61st Congress, 2nd session)." In the dissenting opinion in the same case it was observed that only restricted authority for the future was granted in the Act of June 25, 1910. In *Utah v. Lichliter*, 50 Land Decisions 231, it was stated that the Withdrawal Act was formal recognition of the power of withdrawal and was intended as a limitation thereof rather than a grant of greater power. While, therefore, prior to the Withdrawal Act the President may have had rather broad implied power because of the silence of Congress, after Congress defined the power by statute, the President's authority was thereby limited and any general withdrawal made since then must have been made in the form and manner and for the purposes prescribed by the Act (*United States v. Nicoll*, 1 Paine 646, Fed. Cas. No. 15879; *Mechem, Public Officers, sec.* 511).

The statement in the opinion of this Court in the Midwest case (page 483) that Congress was studious to avoid doing anything which would affect either the public or private rights, and therefore, used language which showed, not only that the statute was not intended to be retrospective, but was not to be construed either as a recognition, enlargement, or repudiation of rights like those asserted by the petitioners, had ref-

erence, not to the right of the President to make withdrawals, but to the respective rights of the United States and of individuals where there had been an entry upon withdrawn land after the Taft withdrawal but before the passage of the Withdrawal Act.

2. *The action of the executive officers in the present case was neither intended as a withdrawal under the Act of June* 25, 1910, *nor did it comply therewith.*

So far as the record shows, the only acts which might be claimed to constitute an Executive withdrawal are two orders of the Secretary of the Interior to his subordinates (R. pp. 16-19). The opinion of the Court of Appeals of the District of Columbia refers to two statements of the President to the press, a telegram of the Commissioner of the Land Office to Registers, and an order of the Secretary of the Interior appointing a Departmental committee to consider existing oil and gas permits (R. pp. 29-31), none of which are included in the Record.

Neither in the President's press statement, nor in the Secretary's orders was there any mention of a withdrawal nor any reference to the Withdrawal Act. The President's message to Congress of December 3, 1929, referred to the matter as a suspension of the issuance of permits and made no mention of a withdrawal. In the 1929 Report of the Secretary of the Interior under the heading of "Oil & Gas Applications", the Secretary referred to the "oil conservation policy" under which "no new applications for prospecting permits had been received" and the portion of the Report

dealing with the withdrawals makes no mention of oil and gas lands, but refers to a small acreage withdrawn for other purposes (1929 Report of the Secretary of the Interior, pp. 29, 32).

Not until the filing of the answer of the respondents to the Rule to Show Cause in the present case was it contended that there had been a withdrawal of public lands. It is apparent, therefore, that the President had no intention of making a withdrawal and that neither he nor the Secretary of the Interior for nearly a year after the suspension of the issuance of permits considered there had been a withdrawal.

It is submitted that the action of the respondents in question cannot be brought within the Withdrawal Act for the following reasons:

(1) Withdrawals may be made only by the President, and in the present case the President has performed no official act, either by ordering a withdrawal, or by approving a withdrawal already made by the Secretary of the Interior.

That withdrawals may be made only by the President appears from the following considerations: (a) that Congress, though requested by the President "to authorize the Secretary of the Interior temporarily to withdraw lands," conferred the withdrawal power on the President instead (see *United States v. Midwest Oil Co.*, 236 U. S. 459); (b) that the power is not inherently or constitutionally executive, but is derived from Congress by statute, and so must be personally exercised (*United States v. Benner, Baldwin*, 234, 24 Fed. Cas. No. 14568; 7 Opinions Attorney General 453, 475); (c) that the statute required the President

to exercise his discretion and such power could not be delegated, even to a Cabinet officer (*Truit v. United States,* 38 Ct. Cl. 398; Mechem, Public Officers, sec. 567; 39 Cyc. 703); and (d) that in the past, the Executive has interpreted the statute as requiring a proclamation to effectuate a withdrawal, withdrawals under the Act of June 25, 1910, having been made either by direct order of the President bearing his signature, or by order of the Geological Survey signed and approved by the President upon the recommendation of the Director of the Geological Survey and the Secretary of the Interior.

In the present instance, the President had issued no direct order, either oral or written, under which the Secretary could act. It is not necessarily to be presumed that a Cabinet officer acts by direction of the President (*Kelly v. Dalles City,* 19 Ore. 229, 24 P. 449; *United States v. McGraw,* 12 Fed. 449). The fact that Cabinet officers sometimes made withdrawals prior to the Withdrawal Act cannot support the present action of the Secretary of the Interior because in the earlier instances referred to there was either prior statutory authority for the action, as in *Wood v. Beach,* 156 U. S. 548; or subsequent statutory ratification of the withdrawal, as in *Wolsey v. Chapman,* 101 U. S. 755; or the President, acting under statutes expressly conferring such power, withdrew the land by proclamation after the Secretary had purported to make a withdrawal, as in *United States v. Morrison,* 240 U. S. 192; or the land was taken over and continuously used by the government department for purposes authorized by statute so that it might be said there was an

appropriation of the land, as there was in *Wilcox v. Jackson*, 13 Pet. 498. Moreover, in view of the restrictive nature of the Withdrawal Act, it does not follow that because the Secretary made withdrawals prior thereto, he may still lawfully exercise that power.

(2) Nowhere does it appear that any particular lands have been withdrawn from the operation of the Leasing Act. The order in this case does not describe any land, but authorizes the local register to refuse any application for a permit. The withdrawals made before March, 1929, either prior to the 1910 Act or subsequent thereto, have been withdrawals of particular land. Prior to the Withdrawal Act it had been held that withdrawals could be made only of particular lands and that failure to describe the land invalidated the withdrawal. *United States v. McGraw*, 12 Fed. 449; *Lockhart v. Johnson*, 181 U. S. 516. The provisions of the Withdrawal Act requiring the Secretary of the Interior to report withdrawals to Congress indicates that Congress intended that withdrawals should be made only of particular lands by specific Executive order describing such lands.

(3) The alleged withdrawal was not temporary. There is no intimation in either the President's statements or in the Secretary's orders that the alleged withdrawal is to be of temporary duration. The Withdrawal Act authorized only temporary withdrawals.

(4) There was no withdrawal for a public purpose within the meaning of the Act. The Withdrawal Act authorized the President to withdraw and reserve lands only "for water power sites, irrigation, classification

of lands, or other public purposes to be specified in the orders of withdrawal." Under the rule of ejusdem generis (Lewis' Sutherland, Statutory Construction, 2d Ed., sec. 422), it is submitted that withdrawals for public purposes under the Withdrawal Act may be made only for purposes of the kind specifically enumerated in the statute, and that the authority to withdraw lands for these purposes refers to governmental use necessary for the proper discharge of executive functions, and does not authorize any broad exercise of power independent of an immediately intended governmental use. Withdrawals hitherto made under the Withdrawal Act were for specific purposes contemplated for governmental use of the land, as to provide military reservations (47 Land Decisions 143); Indian reservations (49 Land Decisions 592); water power sites and reclamation projects (48 Land Decisions 85); to permit a resurvey of lands (49 Land Decisions 597); in aid of proposed legislation to extend the boundaries of a national park (48 Land Decisions 279); to determine whether lands should be classified as mineral in character and therefore not subject to entry under the homestead law (48 Land Decisions 283); and for other purposes. An attempted withdrawal under the Act of March 1, 1847 (9 Stat. 146), which was not made for a then existing public necessity, but was merely a provision contemplated for the possibilities of the future was held invalid by this court in *Spaulding v. Chandler*, 160 U. S. 394. The Interior Department has recognized that the proper purposes of withdrawals are

governmental uses necessary to the proper exercise of executive functions (47 Land Decisions 362).

(5) The purposes for which a withdrawal is made must be specified in the order of withdrawal. This is specially required by the Act. The two telegrams of the Secretary of the Interior which constructed the so-called order of withdrawal failed to specify any purpose for which it was made.

(6) The requirement of the Withdrawal Act that the Secretary report to Congress all withdrawals made by the President has not been complied with. Such failure may be excused only on the ground that the Secretary, as the agent of Congress, had a well-founded belief that no withwrawal had been made.

For the foregoing reasons it is submitted that there has been no valid withdrawal under the provisions of the Withdrawal Act from which executive authority to withdraw lands must be derived.

3. *Even if, in addition to his express power under the Act of June 25, 1910, the President has implied power to withdraw public lands under the doctrine of United States v. Midwest Oil Co., 236 U. S. 459, the alleged withdrawal here involved cannot be supported on the authority of that decision.*

The respondents have attempted to justify their action under the authority of the decision of this Court in the case of *United States v. Midwest Oil Company*, 236 U. S. 459, and the Court of Appeals in its opinion states that "it well might be held that an implied power to withdraw public lands was imposed in the President

under the Act of 1920. *United States v. Midwest Oil Company*, 236 U. S. 459." (R. p. 35.)

The situation in the Midwest case, however, is clearly distinguishable from the present situation. The withdrawal there involved was accomplished by Presidential proclamation, which by its title and terms was stated to be temporary and in aid of proposed legislation; there was no attempted withdrawal of all public lands, but a withdrawal only of a comparatively small and specifically described area; the withdrawal was made at a time when it was possible to obtain absolute title to oil lands; and the power was exercised for the admittedly public purpose of providing petroleum reserves for the navy, and is sustainable probably on that ground alone, since the President is the Commander-in-Chief of the Army and Navy. In the Midwest case, therefore, the President, although doubtful of his authority, intended to make a withdrawal and did everything possible to effectuate that purpose. In the present case there was neither an intention to make a withdrawal nor any act from which might be implied a withdrawal. Since a valid withdrawal has the effect of precluding the acquisition or initiation of certain rights, informal or implied withdrawals are disfavored. There must be some unequivocal act to constitute a withdrawal (*Lockhart v. Johnson*, 181 U. S. 516; *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U. S. 629; *St. Paul, etc. Ry. Co. v. Sage*, 71 Fed. 40; *McLaughlin v. Menotti*, 89 Cal. 354, 26 P. 880).

C.

The Executive has no power to make a general withdrawal of all lands from the operation of the Leasing Act.

The Withdrawal Act was passed at a time when the government followed a policy of *selling* instead of *leasing* oil lands. It was to prevent complete alienation of land that withdrawals were authorized by Congress. The authority conferred by the Withdrawal Act, therefore, is to withdraw lands from "sale" and also from "settlement", "location", and "entry", all of which are steps taken under statutes which allow the complete alienation of the government's title and which, when properly performed, entitle the entryman or settler to a patent. Thus, the term "settlement" as used in public land law refers to the steps which a citizen may take by way of establishing his residence on the land with a view to obtaining a patent. (*Great Northern Railway Co. v. Reed*, 270 U. S. 539.) An oil prospector under the Leasing Act in no sense "settles" on the public land as the term is used in the Withdrawal Act. Similarly the terms "location" and "entry" pertain to purchase or acquisition of title (48 Land Decisions 459). The Interior Department has held that a prospecting permit under the Leasing Act "* * * is not a mode of disposition, but preliminary to leasing." (*Utah v. Lichliter*, 50 Land Decisions 231.)

Prior to the Withdrawal Act the government had followed the policy of leasing certain lands (35 Stat.

783, 28 Stat. 305, 31 Stat. 229), yet the Withdrawal Act did not authorize withdrawals from such leasing. Moreover, when Congress has intended to allow withdrawals from leasing, it has specifically conferred such power, as in the Act of October 20, 1914, 38 Stat. 742.

If the President may withdraw lands from the operation of the Leasing Act, it should follow that when lands are withdrawn "from settlement, location, sale or entry" they are also withdrawn from prospecting and leasing, but the Interior Department has held that such withdrawals do not prevent the issuance of prospecting permits and leases (49 Land Decisions 139; 48 Land Decisions 459). This follows the general rule that withdrawal of land from "sale or entry or preemption" does not withdraw the land from other modes of disposition (*Northern Pacific R. Co. v. Hinchman*, 53 F. 523; *Northern Pacific R. Co. v. Sanders*, 49 F. 129 aff. 166 U. S. 620; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46; 50 *Corpus Juris* 1054).

Assuming, however, that a properly executed withdrawal of lands from "settlement, location, sale or entry" would operate to prevent oil prospecting or leasing, there has, in fact, been no such withdrawal, for public lands are still open to "settlement, location, sale or entry," and citizens may still proceed to acquire public lands under the general land laws, and it follows that public lands are still legally open to those desiring to explore for oil.

That Congress contemplated no general withdrawal from the operation of the Leasing Act is evident from the fact that one of the purposes in passing the Leas-

ing Act was to get the public domain out from under the effect of outstanding executive withdrawals, which at the time the act was passed, totalled more than 53,000,000 acres (Congressional Record, Vol. 58, 66th Congress, 1st session, pp. 4784, 4287, 4580, 4290 & 4741).

D.

The writ of mandamus should issue.

In the opinion of the Court of Appeals it is stated that "mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, to remedy and not to promote a wrong, to compel the performance of an actual duty rather than to direct the performance of an act which will work public or private mischief. While classed as a legal remedy, its issuance is largely governed and controlled by equitable principles." (R. p. 36.) The court also observed that "the President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location" and that "his orders, issued through the Secretary, were intended to meet an emergency occasioned by the great over-production of oil and gas, the waste incident thereto, and other public considerations." (R. p. 36.)

The implication is that it is the duty of the Secretary and the President to determine what is for the good of the public, and, if the policy of Congress as expressed in a statute conflicts with the opinions of the President and the Secretary, they may dispense with the statute and initiate their own policy without amenability to

the courts. It is sufficient answer to point out that the obligation imposed upon executive officers to see that the laws are faithfully executed does not imply any power to forbid their execution (*Kendall v. United States*, 12 Pet. 524, 612). There is nothing in the Record in the instant case to warrant the judicial assumption that reckless waste and irreparable dissipation of resources would follow if the Leasing Act is again allowed to operate as intended. As has already been pointed out, the law provides the means for the prevention of waste and the protection of the public welfare, and the respondents have adduced nothing to show the inadequacy of the statutory methods.

The discretion which the court exercises as to the issuance of a writ of mandamus is a judicial discretion resting on equitable principles and exercised in accordance with well settled rules of law (*United States v. Lane*, 249 U. S. 367). It has been held an abuse of such discretion to refuse the writ where a statute regulating the matter is thereby abrogated and the relator has no other remedy (*United States ex rel. McBride v. Shurz*, 102 U. S. 378; *State v. Dickerson*, 33 Nev. 540, 113 P. 105; *State v. Werra Aluminum Foundry Co.*, 173 Wis. 651, 654; 182 N. W. 354, 22 A. L. R. 1).

In the present case, the petitioner, having been deprived of a statutory right, has no remedy except mandamus. Oil and gas lands are to be disposed of only in the manner and form provided by the Leasing Act and the Secretary refuses to carry out that act. On the other hand, although the Leasing Act provides lawful means for preventing and punishing waste and

protecting the public welfare, and although the Secretary may agree with permittees to suspend drilling to prevent waste and over-production, he has chosen to disregard the law and arbitrarily refuses to consider any applications or to issue any permits. The case is much like that of *United States ex rel. McBride v. Shurz*, 102 U. S. 378, 383, 404, in which this Court ordered the issuance of mandamus after considering that the relator had no other remedy, whereas there were other ways in which the Secretary of the Interior might prevent the "public mischief" and "hardship" which it was alleged would result.

The writ may properly be refused on equitable principles where the relator comes into the court without clean hands (*United States v. Burleson*, 255 U. S. 407; *Duncan Townsite Co. v. Lane*, 245 U. S. 308); where he has been guilty of laches (*Sheffield v. Fountain*, 101 Okla. 168, 224 Pac. 339); where issuance of the writ would cause numerous legal disputes and in the end would be fruitless (*Board of Directors v. Board of Excise*, 31 Okla. 553, 122 Pac. 520); where the relator seeks to obtain a personal advantage through the mistake of a public official (*People ex rel. Wood v. Assessors*, 137 N. Y. 201, 33 N. E. 145); and where the damage to relator is purely theoretical, present procedure not clearly illegal, and relator seeks to compel a strict compliance with the letter in disregard of the spirit of the law (*People ex rel. Harlem Storekeepers' Assn. v. Hylan*, 194 N. Y. S. 179). If, however, mandamus is otherwise appropriate, the writ is not to be refused on the basis of vague speculations as to which

of two governmental policies might be of greater ultimate benefit to the country, or on speculations as to which of two statements is true (*Delaware L. & W. RR. Co. v. Rellstab*, 276 U. S. 1, 5). Mandamus would become valueless as a remedial writ against defaulting public servants if it is to be denied in every case where the cry "*pro bono publico*" is raised (*Cf. Roberts v. United States*, 176 U. S. 221; *Wilbur v. United States ex rel. Krushnic*, 280 U. S. 306).

The decision of the trial court that mandamus should issue in the present case is entirely in accord with the equitable principles controlling issuance of the writ. The petitioner sought to comply with the law, not to annul it. Having no other remedy, he seasonably applied to the court for exercise of its extraordinary jurisdiction to compel a public official to perform a statutory duty. If the petitioner is right in his position that the Leasing Act is mandatory, and there has been no withdrawal, it is submitted that in the absence of any abuse or unlawful exercise of discretion, the propriety of issuing the writ is not a proper subject for the review of the higher courts (38 *Corpus Juris*, 949, 950, *East St. Louis v. Amy*, 120 U. S. 600; *Little Rock v. United States ex rel. Howard*, 103 Fed. 418, 426; *People ex rel. Lehmaier v. Interurban St. Ry. Co.*, N. Y. Ct. App. 69 N. E. 596).

CONCLUSION.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers

by granting a writ of certiorari, and thereafter reviewing and reversing the decision of the Court of Appeals of the District of Columbia

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SUPREME COURT OF THE UNITED STATES.

Nos. 618, 676, 704, 743.—October Term, 1930.

United States of America *ex rel.* Ethel M. McLennan, Petitioner,
618 *vs.*
Ray Lyman Wilbur, Secretary of the Interior.

United States of America *ex rel.* H. H. Simpson, Petitioner,
676 *vs.*
Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office.

United States of America *ex rel.* Roy G. Barton, Petitioner,
704 *vs.*
Ray Lyman Wilbur, Secretary of the Interior.

United States of America *ex rel.* W. B. Pyron, Petitioner,
743 *vs.*
Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office.

On Writs of Certiorari to the Court of Appeals of the District of Columbia.

[May 18, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

All these causes turn on the same point of law; the records disclose facts not materially different; one opinion will suffice.

The Act of Congress approved February 25, 1920, 41 Stat. 437, intended to promote certain mining operations, contains thirty-eight sections.

Sec. 1. "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United

States, . . . shall be subject to disposition in the form and manner provided by this Act . . . . ."

"Sec. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. . . ."

"Sec. 14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: . . . . ."

Section 9 authorizes the Secretary to lease lands containing deposits of phosphates under such general regulation as he may adopt. By Section 17 unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field "may be leased by the Secretary of the Interior to the highest responsible bidder, . . ." such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, etc. Section 21 authorizes the Secretary to lease deposits of oil shale under such regulations as he may prescribe, for indefinite periods.

Section 2 declares that the Secretary "is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, . . ." and thereafter "shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for

leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant. . . . ''

"Sec. 22. That any bona fide occupant or claimant of oil or gas bearing lands in the Territory of Alaska, who, or whose predecessors in interest, prior to withdrawal had complied otherwise with the requirements of the mining laws, but had made no discovery of oil or gas in wells and who prior to withdrawal had made substantial improvements for the discovery of oil or gas on or for each location or had prior to the passage of this Act expended not less than $250 in improvements on or for each location shall be entitled, upon relinquishment or surrender to the United States within one year from the date of this Act, or within six months after final denial or withdrawal of application for patent, to a prospecting permit or permits, lease or leases, under this Act covering such lands, . . . ''

Section 23. That the Secretary "is hereby authorized and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium . . . . ''

These provisions quite plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Also, the difference between applicants for mere privileges and those persons who because of expenditures, or otherwise, deserved special consideration.

The petitioners, acting separately and as directed by the general rules and regulations, either filed or sought to file applications for permits to prospect for oil and gas under Section 13. In order to effectuate the conservation policy of the President, the Secretary of the Interior by a general order either rejected or refused to receive their applications. Thereupon, these proceedings were begun in the Supreme Court, District of Columbia. They seek writs of mandamus to compel the Secretary to receive or reinstate the applications and act upon each according to its merits.

Answering, the Secretary admitted issuance of the general order and action thereunder. All this he claimed was done in pursuance of the authority vested in him by law. The Supreme Court of the District held against him and ordered receipt or reinstatement of petitioner's applications followed by definite action thereon.

The Court of Appeals reached a different conclusion and reversed the judgments.

The answers aver "that under the Act, [1920] the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant." Having examined the Act we cannot say that by any clear and indisputable language it refutes his position. Certainly, there is ground for a plausible, if not conclusive, argument that so far as it relates to the leasing of oil lands it goes no further than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare.

It is unnecessary now to declare the precise meaning of the relevant provisions of the Act. It was passed when according to a widely accepted view decline of petroleum production in the United States was imminent. In fact, there has been an enormous increase and a consequent troublesome surplus. Looking only at its words one may interpret Section 13 as the Secretary says he did. And this conclusion is aided by consideration of his general powers over the public lands as guardian of the people. Section 441, R. S.; *United States* v. *Grimaud*, 220 U. S. 506; *Williams* v. *United States*, 138 U. S. 514; *Knight* v. *Association*, 142 U. S. 161; also the right of the President to withdraw public lands from private appropriation. *United States* v. *Midwest Oil Co.*, 236 U. S. 459; Withdrawal Act, 1910, 36 Stat. 847.

Under the established rule the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable. *United States ex rel. The International Contracting Company* v. *Lamont*, 155 U. S. 303, 308; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Work* v. *Rives*, 267 U. S. 175.

The judgments under review must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.